No. 89-1217-CFX
Status: GRANTED

Title: James P. Lehnert, et al., Petitioners
v.
Ferris Faculty Association, et al.

Docketed:
January 30, 1990

Court: United States Court of Appeals
for the Sixth Circuit

See also:
89-1415

Counsel for petitioner: LaJeunesse Jr.,Raymond J.

Counsel for respondent: Chanin,Robert H., Goldberg,Fredric N.

40 printed copies recd. 1/30; 12.4 letter on file.

Entry	Date	Note	Proceedings and Orders
1	Jan 30 1990	G	Petition for writ of certiorari filed.
3	Feb 13 1990		Order extending time to file response to petition until April 2, 1990.
4	Feb 22 1990		Waiver of right of respondent Board of Control of Ferris State University, etc. to respond filed.
5	Mar 2 1990		Brief amicus curiae of Public Service Research Council filed.
6	Apr 2 1990		Brief of respondents Ferris Faculty Association, etc., et al. in opposition filed.
7	Apr 4 1990		DISTRIBUTED. April 20, 1990
8	Apr 12 1990	X	Reply brief of petitioners James P. Lehnert, et al. filed.
9	Jun 1 1990		REDISTRIBUTED. June 7, 1990
10	Jun 11 1990		Petition GRANTED.
			**********
11	Jul 25 1990		Brief amici curiae of Pacific Legal Foundation and H. Paul Lillebo filed.
12	Jul 25 1990		Joint appendix filed.
		*	In two volumes
13	Jul 26 1990		Brief amicus curiae of Public Service Research Council filed.
14	Jul 26 1990		Brief of petitioners James P. Lehnert, et al. filed.
15	Jul 26 1990		Brief amicus curiae of Landmark Legal Foundation filed.
16	Jul 26 1990		Brief amicus curiae of Center on National Labor Policy filed.
18	Aug 14 1990		Order extending time to file brief of respondent on the merits until September 10, 1990.
19	Aug 24 1990		Record filed.
		*	Certified original record received.
21	Sep 6 1990		Brief amici curiae of American Fed. of State, County & Municipal Employees, et al. filed.
20	Sep 10 1990		Brief amicus curiae of AFL-CIO filed.
22	Sep 10 1990		Brief of respondents Ferris Faculty Association, etc., et al. filed.
23	Sep 19 1990		CIRCULATED.
25	Sep 26 1990		SET FOR ARGUMENT MONDAY, NOVEMBER 5, 1990. (2ND CASE)
24	Oct 15 1990	X	Reply brief of petitioners James P. Lehnert, et al. filed.
26	Oct 19 1990		Record filed.
		*	Certified copy of original record, received. (3 boxes).
27	Nov 5 1990		ARGUED.

89-1217

FILED
JAN 30 1990
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CLERK

No. 89-___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JAMES P. LEHNERT, *et al.*,

Petitioners,

v.

THE FERRIS FACULTY ASSOCIATION-MEA-NEA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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January 1990

QUESTIONS PRESENTED

Do the first and fourteenth amendments to the United States Constitution permit a public employer to compel objecting nonunion public employees to contribute, as a condition of their employment, to the costs of the following activities engaged in by their exclusive bargaining representative and its state and national affiliates:

a) activities on behalf of persons not in the employees' bargaining unit, including employees in other states and different professions, and retirees;

b) lobbying at state and federal levels on measures not for ratification of, or authorization or appropriation of funds for, the bargaining agreement covering the employees' bargaining unit;

c) electoral politics, including campaigns concerning ballot issues;

d) public relations activities;

e) non-bargaining activities related only generally to the employees' profession;

f) meetings of the affiliates that primarily serve political and ideological purposes; and,

g) threatening and preparing for illegal strikes.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the parties to the proceedings below were:

Petitioners: Elmer S. Junker, James E. Lindsey, Sam C. Peticolas, John R. Schauble, and Theodore D. Speerman. Each of said parties joins in this petition.

Respondents: Michigan Education Association; National Education Association of the United States; the Board of Control of Ferris State College; Earl D. Gabriel, Robert P. Gerholz, Fran Harris, Delbert D. Long, Robert C. Redman, Thomas P. Scholler, Patricia M. Short, and Steven L. Thomas, members of the Board of Control of Ferris State College, in their official capacities; Robert L. Ewigleben, President of Ferris State College, in his official capacity; S. Eugene Bychinsky, Vice President, Personnel, of Ferris State College, in his official capacity.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-

JAMES P. LEHNERT, *et al.*,

Petitioners,

v.

THE FERRIS FACULTY ASSOCIATION-MEA-NEA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners James P. Lehnert, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on August 14, 1989.

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals (Appendix ("App.") A, *infra*, 1a, 13a) are reported at 881 F.2d 1388. The opinion and judgment order of the United States District Court for the Western District of Michigan are reported at 643 F. Supp. 1306 (App. B, *infra*, 18a, 77a); its opinion denying a motion for partial new trial

and to alter or amend the judgment (App. C, *infra*, 81a) is reported at 685 F. Supp. 164.[1]

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1989. On September 19, 1989, the court of appeals granted petitioners leave to file a petition for rehearing one day out of time, *i.e.*, on August 29, 1989, when that court received it (App. E, *infra*, 89a). The petition for rehearing was denied on November 7, 1989 (App. F, *infra*, 90a). The time for petitioning for certiorari runs from the latter date. *Bowman v. Loperena*, 311 U.S. 262, 266 (1940). The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1) (West Supp. 1989).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first amendment to the United States Constitution states in pertinent part: "Congress shall make no law * * * abridging the freedom of speech * * * or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Section 1 of the fourteenth amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law." The Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982), says in pertinent part:

[1]Earlier opinions of the district court not necessary to ascertaining the grounds of the judgment sought to be reviewed, the basis for federal or appellate jurisdiction, or to reviewing the questions presented are reported at 556 F. Supp. 309 (denying motions to dismiss and for abstention and summary judgment) and 556 F. Supp. 316 (denying motion for protective order).

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The state statutes involved are the Michigan Public Employment Relations Act ("PERA"), Mich. Comp. Laws §§ 423.201-.216 (1979), and Michigan Compiled Laws § 408.477 (1979). Their pertinent provisions are reprinted, respectively, in Appendix G, *infra*, 92a, and H, *infra*, 95a.

STATEMENT OF THE CASE

Petitioners are six present or former faculty members employed by Ferris State College ("Ferris"), a four-year public institution of higher learning in Michigan. Although not union members, they are or were employed in a bargaining unit, consisting only of faculty at Ferris, represented exclusively for purposes of collective bargaining by a union, the Ferris Faculty Association ("FFA"). App. A at 1a-2a.

The FFA, which represents only the one unit, is affiliated with the Michigan ("MEA") and National ("NEA") Education Associations. Under an "agency shop" provision in the collective bargaining agreements in effect since 1981, as authorized by the PERA, Mich. Comp. Laws § 423.210 (App. G at 92a-93a), and Michigan Compiled Laws § 408.477 (App. H at 95a), Ferris automatically deducted from the pay of nonmembers a "service fee" equal to the dues of members of the FFA, MEA, and NEA, "less any amounts not permitted by law." App. B at 19a-23a & n.3.

The MEA and NEA have other local affiliates which represent employees elsewhere in Michigan and other states, including states where public-sector bargaining is not permitted. Some locals represent faculty at other higher education institutions; but most represent teachers in public elementary, intermediate, or high schools ("K-12"). Others represent faculty or teachers in private or parochial education, and yet others represent educational support personnel (*e.g.*, school secretaries) in the various types of institutions. The MEA and NEA are "highly politicized organization[s], active in causes both related and unrelated to collective bargaining, contract administration and grievance adjustment." *Id.* at 32a, 39a-40a.

On the authority of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the nonmembers objected to the exaction of service fees for any purposes other than the performance of the FFA's duties as exclusive representative of the Ferris unit. App. B at 25a. They brought this civil rights action under, *inter alia*, 42 U.S.C. § 1983, claiming that the freedoms of speech, thought, conscience, assembly, petition, and association secured to them by the first and fourteenth amendments are violated to the extent that the fee includes the costs of such other activities. Federal jurisdiction is based on 28 U.S.C. §§ 1331 and 1343 (1982). In addition to the FFA, MEA, and NEA ("the unions"), the governing Board of Control of Ferris, its members and two officers of Ferris, in their official capacity, were named as defendants. App. B at 18a-20a.[2]

In pre-trial proceedings, the parties agreed that the issue of which union expenditures constitutionally are chargeable to objecting nonmembers would be tried only

[2]Pursuant to stipulation and order, only injunctive relief was sought against the nonunion defendants. App. B at 19a.

with regard to the unions' fiscal year 1981-82. A portion of the fees demanded of plaintiffs for that year was put in escrow. App. B at 23a-24a. After a twelve-day bench trial at which the court heard twelve witnesses and admitted ninety exhibits, judgment was entered for the employees. *Id.* at 19a, 77a-78a.

The district court held that certain union expenditures were chargeable, others were not as a matter of law, and yet others were not because the unions did not meet their burden of proof. *Id.* at 44a-66a. In addition, the unions' procedures for collecting service fees were declared unconstitutional under the standards set out in *Teachers Local 1 v. Hudson*, 475 U. S. 292 (1986). App. B at 66a-75a. The judgment enjoined deduction of fees until further order, required restitution of most of the employees' escrowed funds, and ordered that the unions were entitled to specified amounts for 1981-82. *Id.* at 77a-78a.

A motion for partial new trial and to alter or amend the judgment filed by the unions was denied. App. D, 87a. They noticed appeal, and the employees filed a timely cross-appeal. After a partial settlement agreement, the unions dismissed their appeal; the cross-appeal was limited to the contention that the district court erred in concluding that the costs of certain activities were constitutionally chargeable to objecting nonmembers. App. A at 3a. The challenged activities included: (1) activities on behalf of persons not employed in the FFA's bargaining unit; (2) lobbying; (3) electoral politics; (4) public relations; (5) professional/educational activities; (6) conventions of the MEA and NEA and meetings of another level of the unions' structure, the 13E Coordinating Council ("13E"); and (7) preparations for illegal strikes. *Id.* at 5a-12a.

The court of appeals affirmed. *Id.* at 13a. Judge Merritt concurred in the holding that the costs of the

MEA and NEA conventions and 13E meetings are constitutionally chargeable. However, he vigorously dissented with regard to the other disputed activities. *Id.* at 13a-17a. Because less than a majority of all active judges of the court of appeals favored the suggestion, a petition for rehearing and suggestion of en banc consideration was referred to the original panel. It denied rehearing. App. F, 90a.

REASONS FOR GRANTING THE WRIT

I. ALTHOUGH THIS COURT HAS NOT DETERMINED THE PRECISE QUESTIONS PRESENTED, THE PANEL MAJORITY'S DECISION CONFLICTS WITH THIS COURT'S APPLICABLE PRECEDENTS, WHICH NARROWLY LIMIT THE PURPOSES FOR WHICH COMPULSORY FEES LAWFULLY MAY BE COLLECTED

Abood, 431 U.S. at 232, 235-36, held that the first amendment prohibits a union from using an objecting nonmember's agency-shop fees "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative," *i.e.*, for other than "collective-bargaining, contract administration, and grievance-adjustment purposes." Because of the case's posture, *Abood* did not further define what, and where, union activities can constitutionally be financed from dissenters' service fees. *Id.* at 236-37.

This case presents those "difficult constitutional questions," *id.* at 237 n.34, which the Court has not yet more specifically addressed in a public-sector context. However, two related decisions, *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), and *Hudson*, establish that chargeable

costs must be defined narrowly in the public sector, because the coerced collection of service fees, even for bargaining, is "a significant impingement on First Amendment rights," *Ellis*, 466 U.S. at 455; *accord Hudson*, 475 U.S. at 301 & n.8, 307 n.20.

Ellis determined what financial obligations an exclusive representative may impose upon nonmembers under the first amendment and § 2, Eleventh of the Railway Labor Act ("RLA"), 45 U.S.C. § 152, Eleventh (1982). While based partly on statutory construction, *Ellis* has constitutional underpinnings. *See Roberts v. United States Jaycees*, 468 U.S. 609, 637-38 (1984) (O'Connor, J., concurring). In *Ellis*, 466 U.S. at 441, the Ninth Circuit reasoned that, if "activities ultimately benefited the union's collective-bargaining efforts, the union was free to finance them with dues collected from objecting employees." This Court rejected that amorphous standard and narrowly defined chargeable activities "to avoid the constitutional difficulty" raised by the argument that the union's use of dissenters' fees for certain disputed purposes violated the first amendment. *Id.* at 444-48, 451-53.

This case differs from *Ellis* only in two respects. First, the rights violated here are wholly constitutional, not statutory, because the Michigan agency-shop statute, Mich. Comp. Laws § 423.210(10)(1)(c), (2), "'sanctions the use of nonunion members' fees for purposes other than collective bargaining.'" *Abood*, 431 U.S. at 232 (quoting *id.*, 60 Mich. App. 92, 99, 230 N.W.2d 322, 326, *appeal denied*, 395 Mich. 755 (1975)). As the Court said in *Abood*, 431 U.S. at 240, "that difference surely could not justify any lesser relief in this case." Second, although this is a public- rather than private-sector case, the "differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights." *Id.* at 232. Thus, although "in the public sector the line may be somewhat hazier" between activities

"for which contributions may be compelled" and those "for which such compulsion is prohibited," *id.* at 236, compulsion still is prohibited by the first amendment unless a disputed activity directly serves the governmental interest that the agency shop is thought to advance.

Any prior doubt that normal first-amendment strict scrutiny is necessary in defining constitutionally chargeable costs under a public-sector agency-shop arrangement was dispelled by *Hudson*. Because *Hudson* concerned the procedures for collection of service fees, it did not further delineate "'the line between union expenditures that all employees must help defray and those that are not sufficiently related to collective bargaining to justify their being imposed on dissenters.'" *Hudson*, 475 U.S. at 294, 304 n.13 (quoting *Ellis*, 466 U.S. at 447). Nonetheless, *Hudson* has significance in drawing that line.

In *Hudson*, 475 U.S. at 302-03 & n.11 (footnote omitted), the Court relied on *Roberts*, 468 U.S. at 623 (which cited *Abood*), *Elrod v. Burns*, 427 U.S. 347, 363 (1976), and earlier statements of the strict-scrutiny test for the conclusion that,

> although the government interest in labor peace is strong enough to support an "agency shop" notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure [for determining chargeable costs] be carefully tailored to minimize the infringement.

Because the substantive legal standard for determining chargeable costs is even more important to that determination than the procedure, there is even greater reason to tailor carefully and narrowly apply the definition. Unfortunately, although the majority below recognized that the *Ellis* test is applicable here, App. A at 4a, it ignored *Hudson*'s command of strict scrutiny in interpreting and

applying it. Consequently, as Judge Merritt pointed out, the majority "significantly expand[ed] *Ellis* without justification and without serious attention to the protections of the First Amendment." *Id.* at 14a (dissenting).

A. THE PANEL MAJORITY PLACED NO PRACTICAL LIMITS ON A UNION'S ABILITY TO FORCE OBJECTING NONMEMBERS TO SUBSIDIZE ITS SPEECH AND ASSOCIATIONAL ACTIVITIES

Under the rulings below, in calculating a service fee public-sector unions may ignore the bargaining unit and the statutory definition of their duties as a nonmember's exclusive representative. The panel majority's decision permits unions to charge a nonmember for their activities, including political and ideological activities, as long as the activities appear to advance some employment-related interest of employees (or former employees) they represent somewhere. *Id.* at 5a-12a. Because a union presumably intends everything that it does to advance some employment-related interest of some employees it represents, the practical effect is to leave no geographic or functional limit on the collection of compulsory union fees from objecting public employees. That decision rests on four erroneous premises which are directly contrary to the applicable decisions of this Court.

First, the majority interpreted *Ellis* as holding that "union expenditures necessarily or reasonably incurred for the purpose of performing the duties of an exclusive bargaining representative were chargeable to dissenting employees," "even if the chargeable activities * * * were *unrelated* to the specific bargaining unit of the dissenting employees." *Id.* at 10a. The majority did not quote language so holding in *Ellis*, because *Ellis* actually held

precisely the opposite, as Judge Merritt recognized *Id.* at 13a-16a (dissenting).

The specific issue in *Ellis* was whether certain categories of union expenditures were lawfully chargeable to objecting nonmembers under the RLA and the first amendment. The Court began its analysis by stating the *raison d'etre* for any constitutionally valid compulsory unionism provision: the "essential justification for authorizing the union shop was the desire to eliminate free riders—employees *in the bargaining unit* on whose behalf the union was *obliged to perform its statutory functions*." *Ellis*, 466 U.S. at 447 (emphasis added); *accord Abood*, 431 U.S. at 221-24.

By definition, an exclusive representative owes no statutory obligation to employees in one unit to represent employees in any other. *See Ellis*, 466 U.S. at 451-53.[3] Therefore, as Judge Merritt said,

> Applying the Railway Labor Act in light of First Amendment principles, * * * the Court determined that Congress did not authorize the charging of expenditures that were not related to "the duties of [the Union as] an exclusive representative *of the employees* in dealing with *the employer*." The Supreme Court insisted that an expenditure must be for "activities normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative *of the employees in the bargaining unit*."

App. A at 14a (dissenting) (citation omitted) (quoting *Ellis*, 466 U.S. at 448).

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[3]That is as true under the PERA as it is under the RLA: "Representatives designated or selected for purposes of collective bargaining by the majority of the public employees *in a unit* appropriate for such purposes, shall be the exclusive representatives of all the public employees *in such unit* for the purposes of collective bargaining * * * ." Mich. Comp. Laws § 423.211 (emphasis added) (App. G at 93a).

In considering two of the expense categories challenged in *Ellis*, "organizing" and "litigation," the Court explicitly and emphatically used that bargaining-unit limitation. Organizing expenses are not chargeable, because they "are spent on employees outside the collective-bargaining unit already represented." *Ellis*, 466 U.S. at 452.[4] And, "unless the [employees'] bargaining unit is directly concerned, objecting employees need not share the costs of the union's [litigation]." *Id.* at 453. The panel majority ignored those holdings of *Ellis*, citing instead its rulings concerning the union's national convention and publication. *See* App. A at 10a-11a. However, the latter rulings also are fully consistent with a bargaining-unit limitation.

The convention was chargeable in *Ellis*, because it was an institutional expense "essential to the union's discharge of its duties as bargaining agent" for the dissenters' unit. *Ellis*, 466 U.S. at 448-49.[5] And, contrary to the panel

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[4]That *Ellis*, 466 U.S. at 452 n.13, also disallowed organizing within the unit on another ground does not vitiate the importance of its *rationale* for holding that organizing outside the unit is not chargeable.

[5]The court of appeals found that holding dispositive as to the chargeability of the MEA and NEA conventions and the 13E meetings. App. A at 6a; *see id.* at 13a (Merritt, J., concurring in part). However, the convention in *Ellis*, 466 U.S. at 448-49, was held only once every four years to maintain the exclusive representative's "corporate or associational existence," "elect officers to manage and carry on its affairs," and "establish bargaining goals and priorities," and the costs of any political activities that occurred at it apparently were "'deducted from [the dues of] objecting employees,'" *id.* at 459 n.1 (Powell, J., dissenting in part) (quoting Brief for Respondents at 29 n.16, *Ellis* (No. 82-1150)). It is a far cry from such a necessary convention of the bargaining agent itself, with only an incidental political component, to *three* conventions and several other meetings held *every* year by *affiliates* of the agent for *primarily* political and ideological purposes. If certiorari is granted, we will demonstrate those distinguishing facts from the record. The [note cont'd on p. 12]

majority's statement, *Ellis* did not hold that the costs of a union publication are chargeable "insofar as the publication reported on activities chargeable to dissenters, even if the chargeable activities reported on were *unrelated* to the specific bargaining unit of the dissenting employees," App. A at 10a. *Ellis*, 466 U.S. at 451 & n.11 (emphasis added), held only that the union could "charge objecting employees for reporting to them about those activities it can charge *them* for doing," *not* for reporting about activities for which it "cannot spend dissenters' funds," including organizing and litigation not directly concerning their bargaining unit. In short, the bargaining-unit limitation applied to publications.

Second, the panel majority conceded that "it is clear * * * that dissenting employees in the private sector may not be charged for political or ideological union activities." App. A at 7a. It nonetheless held that "union lobbying to obtain funds for public education generally * * * and other similar political activities," including "millage and ballot campaigns," are chargeable, even if *un*related to the Ferris unit, because there "are, as noted * * * in *Abood*, fundamental differences between collective bargaining in the public sector and in the private sector." *Id.* at 7a-10a. However, the majority's holding does not follow from and is, indeed, contrary to *Abood*.

Abood, 431 U.S. at 232 (emphasis added), held that the "differences between public- and private-sector collective bargaining simply *do not translate into differences in First Amendment rights*." It was precisely *because* "Michigan law also permits union expenditures for *legislative lobbying* and in support of political candidates," which the

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Court should grant certiorari to clarify that *Ellis* does not permit unions to require objecting nonmembers to subsidize their political rallies by conducting some incidental administrative business at them and calling them "conventions."

Court characterized as "political and ideological purposes unrelated to collective bargaining," *id.* at 215, 232-33 & n.29 (emphasis added), that *Abood* invalidated on first-amendment grounds Michigan's authorization of the use of fees collected from objecting employees for such purposes. *Id.* at 232-36.

Only in *dicta* did the Court speculate that a narrow class of lobbying might be chargeable in the public sector: "The process of establishing *a written collective-bargaining agreement* * * * may require not merely concord at the bargaining table, but subsequent approval by other public authorities; *related* budgetary and appropriations decisions might be seen as an integral part of the bargaining process." *Abood*, 431 U.S. at 236 (emphasis added). Even there, as Judge Merritt explained, that "entire section from *Abood* makes clear that it is the relation of the challenged activity to the bargaining unit which is crucial." App. A at 13a (dissenting).

Third, the panel majority viewed lobbying and other political activities to obtain funding for public education generally as necessary to the duties of a bargaining agent representing educational employees, and "closely connected" to the terms and conditions of employment of such employees. *Id.* at 7a-10a. That is not true in fact, and is contrary to *Pickering v. Board of Education*, 391 U.S. 563 (1968), as a matter of law.

In fact, no provision of the PERA, Mich. Comp. Laws §§ 423.201-.216, imposes a duty on an exclusive representative to advance employees' "interests in legislative and other 'political' arenas," as the majority erroneously assumed, App. A at 7a. In those arenas, the union acts as a voluntary association representing its members, not as a statutory bargaining agent speaking on behalf of all employees in the unit. As a matter of constitutional law, *Pickering*, 391 U.S. at 571-74 (emphasis added), held that

"the question whether a school system requires additional funds" is a matter of public concern "in which the fact of employment *is only tangentially and insubstantially involved*," a relationship the Court saw as too remote to justify infringing first-amendment rights.[6]

Fourth, because it viewed the expenditures as *de minimis*, the panel majority allowed the nonmembers to be charged for certain political and ideological activities that were completely unrelated to bargaining, and professional and public relations activities that it conceded "may not be 'central' to collective bargaining." The majority analogized those expenditures to the *de minimis* expenditures for union social activities held chargeable in *Ellis*, 466 U.S. at 449-50. App. at 10a n.1, 12a. The analogy fails.

First-amendment interests were implicated by the social activities at issue in *Ellis*, 466 U.S. at 456, only "from the union's involvement" in them. Here, however, political and ideological, professional/educational (*e.g.*, curriculum development), and public relations activities inherently implicate significant first-amendment interests beyond the mere fact that they are union activities, as Judge Merritt recognized. *See* App. A at 15a-16a (dissenting). Therefore, the panel majority's holding is contrary to the explicit command of *Hudson*, 475 U.S. at 305, that

[6]As to funding of public education, "it is necessary to regard the teacher as the member of the general public that he seeks to be." *Pickering*, 391 U.S. at 574. Moreover, many of the lobbying and campaign efforts of the unions here were for taxes (including millages), appropriations, and programs for K-12 education only, not even for higher education in general, much less Ferris in particular. Since K-12 and higher education are competitors for scarce public funds, the panel majority thus compels nonmembers to subsidize speech and petition on controversial matters of public concern that are not only against their interests as taxpayers, but also as faculty members. *See, e.g.*, Samuelson, *Back-to-School Economics*, Newsweek, Sept. 23, 1985, at 53.

"whatever the amount, the quality of [nonmembers'] interest in not being compelled to subsidize the propagation of political and ideological views that they oppose is clear." The first amendment does not permit government to "forc[e] an individual to contribute even 'three pence' for the 'propagation of opinions which he disbelieves.'" *Id.* at 305-06 & n.15.[7]

B. THE PANEL MAJORITY'S DECISION ENCOURAGES UNIONS TO THREATEN AND PREPARE FOR UNLAWFUL ACTIVITY, AT THE EXPENSE OF LAW-ABIDING NONUNION EMPLOYEES

The panel majority ruled that objecting nonmembers can "be charged for union expenditures made in publicizing, preparing for and threatening a strike that would be illegal under Michigan law[, b]ecause the union did not actually engage in an illegal strike," and because those preparations and threats were designed "to put pressure on Ferris." App. A at 11a-12a. There is no question that the union could not spend objecting nonmembers' compulsory fees for engaging in an illegal strike, as a matter of Michigan law. *Male v. Grand Rapids Educ. Ass'n*, 98 Mich. App. 742, 295 N.W.2d 918 (1980), *appeal denied*, 412 Mich. 851 (1981). Thus, the majority's ruling is contrary to

[7]More than three pence is at stake, of course. At issue are the costs of those portions of the MEA's primary publication categorized as "Public Relations" and "Other Material" and considered chargeable by the district court, which constituted 27.1% of its total column inches and, thus, equaled $68,859 of the $254,092 expended on it in 1981-82. That is 0.4% of the MEA's total direct expenditures for the year, and 0.4% of an individual nonmember's MEA service fee of $201.20 is $0.80. *See* App. B at 63a-64a, 80a. Moreover, the unions had other substantial expenses for public relations and professional activities that were not allowed only because they were not adequately identified and quantified. *See id.* at 33a-34a, 41a-42a, 62a-66a. In future years, those expenses also could be charged based on the precedent of the majority's holding.

Ellis, 466 U.S. at 451, which held: "If the union cannot spend dissenters' funds for a particular activity, it has no justification for spending their funds for writing [or talking] about that activity."

Judge Merritt correctly analyzed the implications of the majority's decision on this point: "If the strike had gone forward and the house of the college president had been put to the torch, obviously the dissenters could not be charged with the gasoline for the fire. Likewise, dissenters should not be forced to pay the expenses for planning unlawful acts." App. A at 16a (dissenting).

The Court can take judicial notice that illegal, even violent and criminal, acts sometimes occur, and more often are threatened, in labor relations. *See, e.g.*, A. Thieblot & T. Haggard, *Union Violence: The Record and the Response by Courts, Legislatures, and the NLRB* (Labor Relations & Public Policy Series No. 25, 1983). However, that illegal acts are commonly planned and threatened as "bargaining tools" in legal negotiations gives government no compelling interest in requiring nonmembers to subsidize such conspiracies and extortionate speech. The state's only interest in this context is in preventing such subsidization, not in sanctioning it and thus encouraging the illegal activity. *See Male*, 98 Mich. App. at 750, 295 N.W.2d a. 920. Therefore, "[t]o permit a * * * union to force dissenters to finance [threats and preparation for] unlawful acts * * * is no small First Amendment violation." App. A at 16a-17a (Merritt, J., dissenting).

II. THE FIRST-AMENDMENT QUESTIONS PRESENTED SHOULD BE SETTLED BY THIS COURT, BECAUSE OF THEIR EXCEPTIONAL IMPORTANCE AND THE CONFUSION OF THE COURTS OF APPEALS AS TO THEIR RESOLUTION

This is a case of great moment involving individual freedoms and the right of public employees to work without compulsion to support financially union political and ideological activism which, at best, is only tenuously related to a union's statutory duties in representing them in labor-management relations with their employer. Its fundamental importance is shown by the number of times in recent years that this Court granted review in cases presenting similar or related constitutional and statutory questions concerning compulsory union fee arrangements. *E.g., Communications Workers v. Beck*, 487 U.S. ___, 108 S. Ct. 2641 (1988); *Hudson*; *Ellis*; *Abood*; *cf. Keller v. State Bar*, 47 Cal. 3d 1152, 767 P.2d 1020, 255 Cal. Rptr. 542, *cert. granted*, 110 S. Ct. 46 (1989) (purposes for which compulsory bar dues may constitutionally be used).

The exceptional importance of the questions presented is due not only to the fundamental nature of the individual first-amendment rights at stake, but also to the large numbers of public employees in many states subject to agency-shop requirements.[8] Thus, if allowed to stand, the panel majority's broad interpretation of the purposes for which coerced union fees may constitutionally be spent could result in widespread distortion of the political and legislative processes. "Conditioning public employment on partisan support prevents support of competing political interests." *Elrod*, 427 U.S. at 356. "Given the increasingly

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[8] As of 1984, compulsory unionism provisions for public employees were statutorily authorized in some twenty states. *Developments in the Law—Public Employment*, 97 Harv. L. Rev. 1611, 1727 & nn. 9-12 (1984).

pervasive character of government employment, * * * the power to starve political opposition by commanding partisan support, financial and otherwise, may have a significant [distorting] impact on the formation and expression of political beliefs." *Branti v. Finkel*, 445 U.S. 507, 513 n.8 (1980).

In *Hudson*, 475 U.S. at 300, the Court granted certiorari due to "the divergent approaches of other courts to the issue" of the constitutionality of procedures for drawing the line between union activities that are chargeable or not to nonunion public employees. A similar divergence of approaches, if not direct conflict, exists among the courts of appeals on the even more fundamental question of where that line should be drawn.

The majority's decision in this case as to activities outside the bargaining unit stands in stark contrast to the holding of another panel of the Sixth Circuit that a union "may collect *only for those expenses affirmatively related to the bargaining agreement* because these constitute the only expenditures that, consistent with the First and Fourteenth Amendments under *Abood* and *Hudson*, the union may collect to prevent non-members' 'free riding.'" *Tierney v. City of Toledo*, 824 F.2d 1497, 1505 (6th Cir. 1987). It also conflicts with the ruling of the Seventh Circuit in *Hudson v. Teachers Local 1*, 743 F.2d 1187, 1193 (7th Cir. 1984) (emphasis added), *aff'd on other grounds*, 475 U.S. 292 (1986),[9] that

[9]This Court and one judge on the Seventh Circuit's panel found it unnecessary to reach any question of what activities are constitutionally nonchargeable. *Hudson*, 475 U.S. at 304 n.13; *id.*, 743 F.2d at 1197-98 (Flaum, J., concurring in the result).

> the state cannot deprive an individual of his freedom of association by forcing him to support a union, except in accordance with procedures that reasonably assure that the deprivation will go *no further than is necessary* to prevent the individual from taking a free ride on an entity that (whether or not he wants to support it) is providing *services to him as his collective bargaining representative.*

Ignoring *Tierney* and *Hudson*, the panel majority relied on *Crawford v. Air Line Pilots*, 870 F.2d 155 (4th Cir. 1989), for its ruling that expenditures need not be related to the dissenter's bargaining unit to be chargeable. App. A at 11a. However, *Crawford* itself demonstrates the importance and unsettled state of this issue, despite the clear mandates of this Court's decisions in *Abood*, *Ellis*, and *Hudson*. The Fourth Circuit had already granted rehearing en banc in *Crawford*, 870 F.2d at 155 (argued en banc Oct. 3, 1989), thus vacating the panel judgment and opinion under Fourth Circuit Rule 35(c), before this case was decided.

Also, the majority here agreed with the decision in *Robinson v. New Jersey*, 741 F.2d 598 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985), that lobbying and other political activities affecting employment-related matters not subject to bargaining can be charged to objecting nonmembers. App. A at 7a.[10] In contrast, the Fourth Circuit in

[10]The majority also relied on *Knight v. Minnesota Community College Faculty Association*, 571 F. Supp. 1 (D. Minn. 1982) (3-judge court), *aff'd mem.*, 460 U.S. 1048 (1983), and *Champion v. California*, 738 F.2d 1082 (9th Cir. 1984), *cert. denied*, 469 U.S. 1229 (1985). However, those cases are distinguishable, at least in part, because in both negotiated agreements and contract administration were directly subject to action by the state legislature. *Champion*, 738 F.2d at 1086; *Knight*, 571 F. Supp. at 3-4. Thus, unlike this one, *Knight* and *Champion* were cases in which the "process of establishing a written collective-bargaining agreement * * * require[d] not merely concord at the bargaining table, but subsequent **[note continued on page 20]**

Beck v. Communications Workers, 776 F.2d 1187, 1211 n.31 (1985) (dictum), *aff'd en banc*, 800 F.2d 1280 (4th Cir. 1986), *aff'd on other grounds*, 487 U.S. ___, 108 S. Ct. 2641 (1988), said that it "is not easy to reconcile this decision [in *Robinson*] with *Abood*." *See also Beck*, 776 F.2d at 1206 (interpreting *Abood* as holding that service fees may not be collected for "political or lobbying purposes").

This case is particularly suited to ending the lower courts' confusion on the important questions that it presents. As a result of a twelve-day trial, there is a fully developed record about the disputed activities, consisting of the testimony of twelve witnesses and ninety exhibits. App. B at 19a. The case thus provides the "factual concreteness" as to the nature of union activities that *Abood*, 431 U.S. at 236-37 & nn.33-34, saw as necessary to resolving the "difficult constitutional questions" inherent in determining which activities are chargeable.

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approval by other public authorities" and "related budgetary and appropriations decisions might be seen as an integral part of the bargaining process," *Abood*, 431 U.S. at 236 (dictum). In addition, this Court's summary affirmance in *Knight* is not dispositive here, because *Knight*, 571 F. Supp. at 6, concerned only the constitutionality of public-sector exclusive representation; "[c]alculation of the fair share fee [wa]s not in dispute." *See Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 180-83 (1979); *Mandel v. Bradley*, 432 U.S. 173, 175-77 (1977).

CONCLUSION

In a free society, government-sanctioned restrictions on freedom of speech, association, and petition must be narrowly drawn to minimize the infringement on individual rights. *Hudson*, 475 U.S. at 302-03 & nn.11-12; *Elrod*, 427 U.S. at 362-63. The panel majority's expansive construction of the scope of union activities which individuals may be compelled to subsidize as a condition of public employment repudiates that fundamental tenet of first-amendment law. An erroneous precedent thus has been set which misapplies the applicable decisions of this Court and exacerbates the confusion of the courts of appeals on questions which the Court has not explicitly determined in a public-sector case. The petition for certiorari should be granted.

Respectfully submitted,

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January 1990

APPENDICES

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

August 14, 1989

James P. LEHNERT, Elmer S. Junker, James Lindsey, Sam C. Peticolas, John R. Schauble, and Theodore D. Speerman,

Plaintiffs-Appellants,

v.

The FERRIS FACULTY ASSOCIATION, Michigan Education Association, and National Education Association of the United States,

Defendants-Appellees.

No. 87-1700.

United States Court of Appeals,
Sixth Circuit.

Argued Oct. 20, 1988.

Decided Aug. 14, 1989.

Before MERRITT, MARTIN, and MILBURN, Circuit Judges.

BOYCE F. MARTIN, Jr., Circuit Judge.

The plaintiffs, six faculty members at Ferris State College, appeal the judgment of the district court in this § 1983 civil rights action, claiming that the collection and use of service fees as an agency shop violated their rights under the first and fourteenth amendments. We affirm the judgment of the district court.

I.

Since 1975, the Ferris Faculty Association, an affiliate of the Michigan Education Association and the National Education Association, has been recognized under the Michigan Public Employment Relations Act, Mich.Comp.Laws § 423.211, as the exclusive bargaining representative for the faculty of Ferris State College, a four-year public institution of higher learning in Michigan. During the 1981-82 membership year, which is the only relevant year for the purposes of this appeal, the plaintiff faculty members were included in the bargaining unit represented by the Ferris Faculty Association, but did *not* become members of the Association. The collective bargaining agreement in effect during 1981-82 included a service fee provision that required all employees in the bargaining unit who did not belong to the Ferris Faculty Association to pay a service fee equivalent to the amount of dues required of members of the Association. Of the $284.00 service fee required in 1981-82, $24.80 was paid to the Ferris Faculty Association, $211.20 went to the Michigan Education Association, and $48.00 was collected by the National Education Association. Under the unified structure of the unions, membership in the Ferris Faculty Association constituted membership in the Michigan Education Association and the National Education Association as well; consequently, the mandatory service fees paid by nonmembers such as the six plaintiffs were divided among the three affiliated unions. The plaintiff faculty members objected to the use by the unions of their service fees for purposes other than negotiating and administering a collective bargaining agreement with the Ferris Board of Control, the governing body of Ferris State College, and they filed a civil rights action under 42 U.S.C. §§ 1983, 1985 and 1986 against the Ferris Board of Control, the Ferris Faculty Association, the Michigan Education Association and the National Education Association. In their complaint, the plaintiffs alleged that

the unions' use of their mandatory service fees to engage in certain activities, including lobbying and political campaigning, violated their rights under the first and fourteenth amendments.

A trial before the court was held in January and April of 1986. On August 25, 1986, the district court issued its opinion, holding that certain union expenditures were chargeable to the plaintiffs, that other expenditures were not chargeable as a matter of law, and that other expenditures were not chargeable because the unions failed to sustain their burden of proving the expenditures were made for chargeable activities. *Lehnert v. Ferris Faculty Association-MEA-NEA*, 643 F.Supp. 1306 (W.D.Mich.1986). Following a settlement agreement between the parties, this appeal is limited to the claim that the district court erred in holding that the costs of certain disputed union activities were constitutionally chargeable to the plaintiff faculty members.

II.

Before addressing the union activities specifically objected to by plaintiffs, we begin our analysis by surveying the Supreme Court decisions that plaintiffs and defendants both agree must govern our resolution of this appeal. The Court initially addressed first amendment questions in the union shop context in a series of cases brought under the Railway Labor Act. In *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956), the Court held that the Railway Labor Act, which authorized employers and labor organizations acting as exclusive representatives of bargaining units to enter into union shop agreements, did not violate the Constitution. Several years later in *International Association of Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961), the Court held that the Railway Labor Act did not

allow a union, even in a closed shop, to expend union funds to support political causes over the objection of dissenting union members. The Court noted that political uses of funds by a union were not uses that helped defray the expenses of negotiating and administering collective agreements or the expenses of adjusting grievances and disputes. *Street*, 367 U.S. at 768, 81 S.Ct. at 1799. Similarly, in *Brotherhood of Railway and Steamship Clerks v. Allen*, 373 U.S. 113, 121, 83 S.Ct. 1158, 1163, 10 L.Ed.2d 235 (1963), the Court characterized the union expenditures that could be charged to dissenting employees as only those "germane to collective bargaining." Most recently, in *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984), the Court delineated the line between chargeable and nonchargeable union expenditures under the Railway Labor Act. Specifically, the Court stated that

> the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

466 U.S. at 448, 104 S.Ct. at 1892.

Although the Supreme Court has, as we discussed, decided several cases concerning the union shop in the private sector, the Court has considered the constitutionality of the union shop in the public sector only once. In *Abood v. Detroit Board of Education*, 431 U.S.

209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), the Court found the same Michigan statute at issue in this case to be constitutional, thereby approving the union or agency shop in the public sector. The Court noted, however, that the line between collective bargaining, contract administration or grievance adjustment activities, for which contributions from dissenting employees may be compelled, and ideological or political activities, for which such compulsion is prohibited, may be "somewhat hazier" in the public sector. Because the process of establishing a collective-bargaining agreement in the public sector requires not only "concord at the bargaining table, but subsequent approval by other public authorities," budgetary and appropriations decisions could be regarded as an "integral part of the bargaining process" for public employees. 431 U.S. at 236, 97 S.Ct. at 1800. In *Abood*, the Court remarked that it had "no occasion" to attempt to define the hazy dividing line between chargeable and nonchargeable union expenditures in the public sector, but we must, with guidance from *Hanson*, *Street*, *Allen*, *Ellis* and *Abood*, attempt to draw such a line in resolving this appeal.

III.

The plaintiff faculty members contend on appeal that certain union activities were improperly found chargeable to them under the standards set forth in *Abood* and *Ellis*. The challenged union activities include expenditures for the costs of (1) conventions; (2) lobbying and union electoral campaigns; (3) activities on behalf of persons not employed in the plaintiffs' bargaining unit; (4) strike preparation and public relations activities; and (5) miscellaneous professional activities. We disagree with the plaintiffs' claim that the district court erred in holding these disputed expenditures to be chargeable to them.

The plaintiffs argue that union expenditures to send Ferris Faculty Association delegates to the Michigan

Education Association and the National Education Association conventions and to participate in the 13E Coordinating Council, another union structure, should not be chargeable to them. We do not agree. In *Ellis*, the Supreme Court found that the *entire* cost of the national union's convention was chargeable to employees, even though a portion of the convention was apparently "political" in nature. 466 U.S. at 459, 104 S.Ct. at 1898 (Powell, J., dissenting in part). The plaintiff faculty members attempt to distinguish *Ellis* on the ground that the conventions of the Michigan Education Association and the National Education Association (unlike the national convention at issue in *Ellis*) were those of affiliated parent unions rather than a convention of the actual exclusive bargaining representative of the plaintiffs. We are not convinced that this distinction amounts to more than a technical difference in union organization. In any event, the district court noted that the Michigan Employment Relations Commission, which has primary authority for construing the Michigan Public Employment Relations Act, has held that a dissenting employee may be charged for the cost of the Michigan Education Association and the National Education Association conventions under *Ellis* because the "union as affiliated is the exclusive representative." 643 F.Supp. at 1326. For these reasons, we affirm the district court's decision that, under *Ellis*, the objecting plaintiff faculty members may be fully charged for the costs of the union conventions. We affirm for similar reasons the district court's decision that funds spent by the Ferris Faculty Association to send representatives to the 13E Coordinating Council were chargeable, as the court specifically found that the Council developed bargaining strategies and representational policies for bargaining units, including Ferris State College, and the plaintiffs failed to show this finding by the district court to be clearly erroneous.

The plaintiffs also assert that union expenditures for legislative lobbying and for "millage" campaigns and other ballot issues were erroneously found chargeable to them. While it is clear, under *Street* and *Allen*, that dissenting employees in the private sector may not be charged for political or ideological union activities, we believe that the lobbying and other "political" activities of the union in this case were, as required by *Ellis*, "reasonably employed to implement or effectuate the duties" of the Ferris Faculty Association as the exclusive representative of the *public* employees at Ferris State College.

There are, as noted by the Supreme Court in *Abood*, fundamental differences between collective bargaining in the public sector and in the private sector. It cannot be disputed that governmental budgetary and appropriations decisions directly affect the terms and conditions of employment for public employees. To represent their members effectively, public sector unions must necessarily concern themselves not only with negotiations at the bargaining table but also with advancing their members' interests in legislative and other "political" arenas. We therefore agree with the opinion of the Third Circuit in *Robinson v. State of New Jersey*, 741 F.2d 598 (3d Cir.1984), *cert. denied*, 469 U.S. 1228, 105 S.Ct. 1228, 84 L.Ed.2d 366 (1985), and hold that lobbying and similar "political" activities by a public employee union that are "pertinent to the duties of the union as a bargaining representative" may be constitutionally charged to dissenting employees. 741 F.2d at 609. *Accord Knight v. Minnesota Community College Faculty Association*, 571 F.Supp. 1, 6-7 (D.Minn. 1982), *aff'd without opinion*, 460 U.S. 1048, 103 S.Ct. 1493, 75 L.Ed.2d 927 (1983) ("political" activities of the Minnesota Community College Faculty Association that were "related closely and directly to collective bargaining" were found constitutionally chargeable to objecting employees). *See also Champion v. State of California*, 738 F.2d 1082 (9th Cir.1984), *cert.*

denied, 469 U.S. 1229, 105 S.Ct. 1230, 84 L.Ed.2d 367 (1985).

The district court concluded that the legislative lobbying and other political activities engaged in by the Ferris Faculty Association and its affiliated unions were sufficiently related to the unions' duties as the collective bargaining representative of the plaintiffs to be chargeable to them. The major lobbying expense held chargeable by the district court was the Preserve Public Education program of the Ferris Faculty Association. The district court found that the program "was directed at securing funding for public education in Michigan" and held the expenses of the program chargeable because such a program is "directly related" to the duties of an exclusive bargaining representative. The district court also approved charging dissenting employees for articles relating to lobbying and similar political activities in the *Teacher's Voice*, the primary publication of the Michigan Education Association, which is available to all bargaining unit members. Despite the objections raised to these expenditures by the plaintiffs, we cannot disagree with the district court's decision.

The plaintiffs raised several objections to the district court's approval of charging dissenting employees for lobbying and other political activities of the unions. They disputed the finding of the district court that the Preserve Public Education program was a lobbying program directed at securing funds for public education in Michigan but instead contended that the program primarily involved electoral campaigns, including the contesting of ballot issues and the passing of millages. Even if the district court's finding that the Preserve Public Education program was a "lobbying" program were determined by this court to be clearly erroneous, we still believe that the costs of the program are constitutionally chargeable to dissenting employees. Contrary to the plaintiffs' contention,

"political" activities by public sector unions other than legislative lobbying may be charged to dissenting employees if such activities are directly related to collective bargaining. *See Knight*, 571 F.Supp. at 5-7. The plaintiffs in their brief admit that the Preserve Public Education program involved not only lobbying but also millage and ballot campaigns *necessary to fund public education*. Because the terms and conditions of employment for the public sector employees represented by the unions in this case are obviously closely connected to the funding provided to public education, we uphold the district court's decision allowing dissenting employees to be charged for the lobbying and other "political" activities involved in the Preserve Public Education program.

Similarly, we reject the plaintiffs' contention that articles in the *Teacher's Voice* relating to lobbying and other political activities of the unions were improperly found chargeable to dissenting employees. *Ellis* clearly held that dissenting employees may be charged for the costs of a union publication insofar as the publication reported on activities for which dissenters could be charged. 466 U.S. at 450-51, 104 S.Ct. at 1893-94. The plaintiffs assert that articles in the *Teacher's Voice* relating to general lobbying for funds for education may not be charged to them because such lobbying was not directly concerned with Ferris State College and the Ferris Faculty Association. This contention is without merit. It is unrealistic to expect a union, when lobbying a state legislature for funds for public education, to lobby for monies to support each specific institution separately. In our opinion, union lobbying to obtain funds for public education generally is sufficiently related to the unions' duties as the exclusive bargaining representative of the plaintiffs for such lobbying and for articles pertaining to such lobbying and other similar political activities to be

chargeable to the plaintiffs.[1] *See Ellis*, 466 U.S. at 448-49, 104 S.Ct. at 1892-93.

The plaintiffs additionally object to the district court's holding that certain expenditures of the Michigan Education Association and the National Education Association were chargeable even though the expenditures were for union services provided to employees in other bargaining units, rather than for employees at Ferris State College. Our interpretation of *Ellis*, however, forces us to conclude that the plaintiffs' position is untenable. In *Ellis*, the Supreme Court held that union expenditures necessarily or reasonably incurred for the purpose of performing the duties of an exclusive bargaining representative were chargeable to dissenting employees, and the Court applied this general standard to various types of challenged union expenditures. The *Ellis* court concluded that dissenting employees could be charged for the expenses of the union's national convention, even though employees in other bargaining units participated in and benefited from such conventions. Moreover, the Court held that dissenters could be charged for the costs of a union publication insofar as the publication reported on activities chargeable to dissenters, even if the chargeable activites reported on were *unrelated* to the specific bargaining unit of the dissenting employees. Given the Supreme Court's decision in *Ellis*, we believe that the

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[1]Similarly, the plaintiffs object to the district court allowing particular articles in the *Teacher's Voice*, including articles on ballot propositions involving utility rates and a nuclear weapons freeze, to be charged to them. Although the district court may have erred in permitting plaintiffs to be charged for a few particular articles, we decline to overturn the district court's decision. It is not our task to review each and every union expenditure, no matter how minor, for conformity with the law. Because we believe that the district court correctly interpreted and applied the law to the facts of this case, we will not reverse the district court's decision on the basis of allegations of essentially *de minimis* error.

district court did not err in finding the challenged expenditures of the Michigan Education Association and the National Education Association, which were pertinent to the unions' duties as bargaining representatives, to be chargeable to the plaintiffs. *See also Crawford v. Air Line Pilots Association International*, 870 F.2d 155 (4th Cir.1989), in which the Fourth Circuit allowed a union to use the agency fees paid by dissenting employees for expenditures outside of the dissenters' immediate bargaining unit because the expenditures in question were, as required by *Ellis*, "germane" to the union's obligation as bargaining representative.

The plaintiffs furthermore object to the district court's decision allowing them to be charged for union expenditures made in publicizing, preparing for and threatening a strike that would be illegal under Michigan law. Because the union did not actually engage in an illegal strike, the district court found these expenditures chargeable, and we decline to overturn the district court's decision. Based in part upon the testimony of a union witness whom the district court specifically credited, the district court found that, during the process of negotiating a new collective bargaining agreement with Ferris State College, the Ferris Faculty Association spent funds to prepare for a possible strike and to publicize the union's position so as to put pressure on Ferris. 643 F.Supp. at 1312-13. The district court reasoned that such negotiation tactics and public relations activities were within the range of reasonable bargaining tools available to a public sector union during contract negotiations and therefore charged the dissenting employees for the strike preparation and public relations expenses. *See Abood*, 431 U.S. at 228, 97 S.Ct. at 1795. Because the district court's findings of fact on this issue are entitled to considerable deference, *Anderson v. Bessemer City*, 470 U.S. 564, 575, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518 (1985), and because we see no legal errors in the reasoning of the court, we uphold the

decision to charge plaintiffs for the strike preparation and related public relations expenses.

Finally, the plaintiffs assert that the district court improperly charged them for other miscellaneous union expenditures, including expenditures for professional activities and for general public relations activies.[2] We believe that these miscellaneous expenditures were properly charged to plaintiffs. Public relations expenditures designed to enhance the reputation of the teaching profession and professional/educational expenditures intended to improve the profession generally and the skills of teachers specifically are, in our opinion, sufficiently related to the unions' duty to represent bargaining unit employees effectively so as to be chargeable to dissenters. In *Ellis*, the Supreme Court expressly permitted dissenting employees to be charged for union expenditures for social activities, even though such activities were "not central" to the union's function as a collective bargaining representative. 466 U.S. at 449-50, 104 S.Ct. at 1893. Although the expenditures for professional and public relations activities challenged by plaintiffs in this case may not be "central" to collective bargaining, such activities are "sufficiently related to it" to be charged to dissenting employees, 466 U.S. at 449, 104 S.Ct. at 1893, and, in any event, we, as the Court in *Ellis*, are not inclined to scrutinize such *de minimis* union expenses. 466 U.S. at 450, 104 S.Ct. at 1893.

Based upon our foregoing discussion, we affirm the decision of the district court that the challenged union expenditures are constitutionally chargeable to the plaintiffs.

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[2]In their brief, the plaintiffs also object to being charged for the "international activities" of the unions. We do not address this issue because the National Education Association has made the issue moot by agreeing to refund the funds involved.

The judgment of the district court is affirmed.

MERRITT, Circuit Judge, concurring in part and dissenting in part.

I concur in the majority's holding that union expenditures to send Ferris Faculty Association delegates to the Michigan Education Association and National Education Association conventions and to participate in the 13 E Coordinating Council are chargeable to the dissenting faculty members. I do not agree, however, that in a "closed shop" the First Amendment allows the teachers' union, the NEA and its Michigan subsidiaries, to exact union dues from dissenting faculty members of the College bargaining unit to support (1) union lobbying in the state legislatures; (2) union efforts in state and local elections on behalf of candidates and issues; (3) the organizing, public relations and other expenses of teacher bargaining units in schools other than Ferris College; (4) the union's expenses in preparing for illegal strikes at Ferris College which the dissenting faculty oppose and the public relations activites supporting such illegal strikes; and (5) general public relations activities at the state and national levels.

Although my brethren point to a small part of the language in *Abood* to support their conclusion that all kinds of activities not directly connected to the bargaining unit are chargeable to dissenting members of an agency shop, the entire section from *Abood* makes clear that it is the relation of the challenged activity to the bargaining unit which is crucial. *Abood*, 431 U.S. at 236, 97 S.Ct. at 1800. My brothers appear to believe that this relationship need not be a very *close* one. On the contrary, the union needs to show costs of activities which are related to the

particular bargaining unit and not undifferentiated costs of lobbying the legislature generally.

To hold otherwise is to significantly expand *Ellis* without justification and without serious attention to the protections of the First Amendment. It is true that *Ellis* expresses the very general First Amendment rule announced in *Allen* and *Abood*, requiring expenditures to be "germane to the union's duty as collective-bargaining agent." *Ellis*, 466 U.S. at 447, 104 S.Ct. at 1892. Applying the Railway Labor Act in light of First Amendment principles, however, the Court determined that Congress did not authorize the charging of expenditures that were not related to "the duties of [the Union as] an exclusive representative *of the employees* in dealing with *the employer*." *Id*. at 448, 104 S.Ct. at 1892 (emphasis added). The Supreme Court insisted that an expenditure must be for "activities normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative *of the employees in the bargaining unit.*" *Id*. (emphasis added). There simply is no authority in *Ellis*, *Abood* or *Allen* for holding that expenses unrelated to a union's activity on behalf of employees in the plaintiffs' own shop pass constitutional muster.

Allowing the union to exact dues from dissenting non-Union members of the closed shop bargaining unit to pay expenses unrelated to bargaining unit negotiations or grievances unjustifiably expands the holding of the Supreme Court in *Ellis*. It ignores the warning expressed in *Ellis* itself that the closed shop, which forces individuals against their will to support union activities, is already a significant infringement on freedom of expression and conscience: "But by allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights. The dissenting employee is forced to support financially an organization with whose

principles and demands he may disagree." *Ellis*, 466 U.S. at 455, 104 S.Ct. at 1896.

Because the concept of the closed shop seriously affects free speech values, the Supreme Court in *Ellis* left open only a small range of "free-rider" expenses that the dissenting member can be forced to pay. In light of First Amendment protections, those expenses must relate to the expenses of the bargaining unit itself "to defray the costs of collective bargaining, contract administration, and grievance adjustment." *Id*. at 447, 104 S.Ct. at 1892. Expenses for "the expansion of overall union power," *id*. at 451, 104 S.Ct. at 1894, may not be charged to dissenters, *id*. at 452, 104 S.Ct. at 1894. Litigation expenses not connected to the activities of the bargaining unit itself are not allowed. In dealing with litigation expenses, the Supreme Court tells us clearly where the line should be drawn:

> The expenses of litigation incident to negotiating and administering the contract or to settling grievances and disputes, arising in the bargaining unit are clearly chargeable to petitioners as a normal incident of the duties of the exclusive representative. The same is true of fair representation, litigation arising within the unit, of jurisdictional disputes with other unions, and of any other litigation before agencies or in the courts that concerns bargaining unit employees and is normally conducted by the exclusive representative. *The expenses of litigation not having such a connection with the bargaining unit are not to be charged to objecting employees.*

Id. at 453, 104 S.Ct. at 1895 (emphasis added).

Thus *Ellis* establishes the principle that the union expenses charged in a closed shop must relate closely to the activities of the bargaining unit of the dissenting members. The general political, lobbying, public relations and organizing activities of the NEA and its state affiliate

obviously have no such relationship. The union should not be allowed to charge the dissenters with these general expenses, many of which are connected with political positions and philosophies with which the dissenters disagree. To allow the union to exact payments for lobbying, electoral campaigning and public relations forces the dissenters to support ideological positions with which they disagree. The alternative is either to submit or to lose your job. Such forced association and coerced speech violates the First Amendment.

For example, my brothers approve the District Court's determination that certain MEA and NEA expenditures on services to other bargaining units and on the publication of general articles on labor relations in the *Teacher's Voice* are chargeable. A single common error infects both these holdings. The District Court failed to inquire which expenditures directly supported affiliate union locals in *other* bargaining units. It merely ascertained that certain expenditures were germane to the union's general role as bargaining agent for many units without asking the question whether the expenditure is directly related to the Ferris College bargaining unit. If this question had been asked, the insult to First Amendment values arising from forcing the plaintiffs to support the articles on the nuclear freeze proposal and on ballot propositions involving utility rates could not be characterized as merely *"de minimis."*

The only expenses itemized above which directly relate to the Ferris College bargaining unit's activities are the costs of preparing for a public employee strike which the parties agree would have been illegal if carried out. The dissenters were against the illegal strike. If the strike had gone forward and the house of the college president had been put to the torch, obviously the dissenters could not be charged with the gasoline for the fire. Likewise, dissenters should not be forced to pay the expenses for planning unlawful acts. To permit a closed-shop union to

force dissenters to finance unlawful acts on pain of losing their jobs is no small First Amendment violation.

Accordingly, I respectfully dissent.

APPENDIX B

OPINION AND JUDGMENT ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

August 25, 1986

James P. LEHNERT, Elmer S. Junker, James E. Lindsey, Sam C. Peticolas, John R. Schauble, and Theodore D. Speerman, Plaintiffs,

v.

The FERRIS FACULTY ASSOCIATION-MEA-NEA, Michigan Education Association, National Education Association of the United States, the Board of Control of Ferris State College, S. Eugene Bychinsky, Robert L. Ewigleben, Earl D. Gabriel, Robert P. Gerholz, Fran Harris, Delbert D. Long, Robert C. Redman, Thomas P. Scholler, Patricia M. Short, and Steven L. Thomas, Defendants.

No. G 78-346.

United States District Court,
W.D. Michigan, S.D.

Aug. 25, 1986.

OPINION

ENSLEN, District Judge.

Plaintiffs bring this action under 42 U.S.C. §§ 1983, 1985, 1986 claiming violations of rights secured to them by the first and fourteenth amendments to the United States Constitution. Jurisdiction is based on 28 U.S.C. §§ 1331 and 1343. Specifically, plaintiffs allege that they are required by state law to pay to the defendant unions an agency shop or service fee in lieu of union dues and that this agency shop fee is not applied by the unions exclusively to purposes germane to their duties as collective bargaining representative for plaintiffs' bargaining unit. Plaintiffs also claim that the procedures implemented by

the unions to determine and collect service fees are inadequate. Plaintiffs argue that defendants' practices violate their constitutional rights. Both damages and injunctive relief are sought against the union defendants. However, pursuant to an approved stipulation contained in the Pretrial Order of January 15, 1985, solely injunctive relief is sought against the nonunion defendants. Pretrial Order at 89-90. On the basis of this stipulation, the nonunion defendants did not participate at trial.

This case was originally filed in this district on May 22, 1978, and was ultimately tried to the bench over 12 trial days in January and April of this year. The court entertained the testimony of 12 witnesses and accepted 90 exhibits into evidence. The parties completed their post-trial briefing on June 6. This opinion is entered pursuant to Fed.R.Civ.P. 52(a).

I. FINDINGS OF FACT

A. Stipulated Facts

Plaintiffs James P. Lehnert, Elmer S. Junker, James E. Lindsey and John R. Schauble are tenured members of the faculty of Ferris State College (Ferris). Plaintiffs Theodore D. Speerman and Sam C. Peticolas were tenured members of the Ferris faculty until their respective retirements on November 22, 1978 and May 15, 1982.

Defendant Ferris Faculty Association-MEA-NEA (FFA), an affiliate of the Michigan Education Association (MEA) and the National Education Association (NEA), has served as the exclusive bargaining representative of the faculty of Ferris pursuant to Mich.Comp.Laws § 423.211 at all times pertinent to this case. Pursuant to the unified membership concept, membership in the FFA also constitutes membership in the MEA and NEA. The MEA is

a Michigan corporation; the NEA is incorporated under a special act of the United States Congress.

Defendant Board of Control of Ferris State College is a public body corporate established and existing under the constitution and laws of the State of Michigan. Mich. Const. art. VIII, § 6; Mich.Comp.Laws § 390.801 *et seq.* It is empowered to control and manage Ferris.[1] In addition to the Board of Control, other nonunion defendants are the individual members of the Board of Control and the President and Vice-President for Business Affairs of Ferris, in their official capacities.

Since on or about February 22, 1975, the FFA and Ferris have entered into successive collective bargaining agreements containing agency shop provisions.[2] After the FFA and Ferris entered into their first agency shop agreement, the authorizing statute, Mich.Comp.Laws § 423.210, was challenged in the Michigan courts and eventually appealed to the United States Supreme Court. In *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), the Court upheld the constitutionality of the statute and outlined the permissible uses of agency shop fees in public employee unions. The concept of the current agency shop provision was proposed thereafter by Ferris during factfinding upon the advice of

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[1]Ferris is an agency and arm of the State of Michigan, established by the state's constitution and required to be funded by the state. Mich. Const. art. VIII, § 4.

[2]The original agency shop provision was included in the labor contract pursuant to the authority of 1973 Mich.Pub. Acts 25, § 1, codified at Mich.Comp.Laws § 423.210. This early provision stated that all members of the bargaining unit not belonging to the FFA were required to pay agency shop fees equivalent to union dues. The provision also authorized the President of the college, acting as the agent of the Board of Control, to discharge any member of the bargaining unit who failed to comply.

its counsel and with the intent of complying with *Abood*.[3]

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[3]Section 2.6 of union defendants' exhibit I is the agency shop provision of the collective bargaining agreement between Ferris and the FFA for 1981-1984. That section provides, in pertinent part:

> A. Each employee covered by the negotiated Agreement between the Board of Control of Ferris State College and the Ferris Faculty Association (Dated November 19, 1981) shall, as a condition of employment, on or before thirty-one (31) days from the date of commencement of professional duties or July 1, 1981, whichever is later, join the Ferris Faculty Association or pay a *service fee to the Association equivalent to the amount of dues uniformly required of members of the Ferris Faculty Association, less any amounts not permitted by law;* provided, however, that the bargaining unit member may authorize payroll deduction for such fee. *In the event that a bargaining unit member shall not pay such service fee directly to the Association or authorize payment through payroll deduction, the College shall, at the request of the Association, deduct the service fee from the bargaining unit member's salary and remit the same to the Association under the procedure provided below.*
>
> B. The procedure in all cases of non-payment of the service fee shall be as follows:
>
> 1. The Association shall notify the bargaining unit member of non-compliance by certified mail, return receipt requested, explaining that he or she is delinquent in not tendering the service fee, specifying the current amount of the delinquency, and warning him or her that unless the delinquent service fees are paid or a properly executed deduction form is tendered within fourteen (14) days, he or she shall be reported to the College and a deduction of service fee shall be made from his or her salary.
>
> 2. If the bargaining unit member fails to comply, the Association shall give a copy of the letter sent to the delinquent bargaining unit member and the following written notice to the College at the end of the fourteen (14) day period:
>
> The Association certifies that (name) has failed to tender the periodic service fee required as a condition of employment under the 1981-84 Faculty Agreement and demands that under the terms of this Agreement, the College shall deduct the delinquent service fees from the collective bargaining unit member's salary. The Association certifies that the amount of the service fee includes only those items authorized by law.
>
> 3. The College upon receipt of said notice and request for deduction, shall act pursuant to Section A above. In the event of compliance at any time prior to deduction, the request for deduction will be withdrawn. The Association, in enforcing this provision, agrees not to discriminate between bargaining unit members.
>
> C. With respect to all sums deducted by the College pursuant to this Article, The College agrees promptly to disburse said sums directly to the Association.
>
> D. Bargaining unit members paying the service fee provided for herein or whose service fees have been deducted by the College from their salaries may object to the use of their service fee for matters not permitted by law. *The procedure for making such objections is that officially adopted by the Association.* A copy of the Association policy will be provided by the Association upon a request of a bargaining unit member.
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> . . . .
>
> F. This Article shall be effective for each academic year of this Agreement and all sums payable hereunder shall be determined from the beginning of each academic year. Persons becoming members of the collective bargaining unit during the course of an academic year shall have their service fee prorated over the academic year.
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> . . . .
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> I. The Association will certify at least annually to the College, fifteen (15) days prior to the date of the first payroll deduction for professional fees or service fees, the amount of said professional fees and the amount of the service fee to be deducted by the College, and that said service fee includes only those amounts permitted by the Agreement and by law.
>
> J. Should the provisions of 2.6, Agency Shop, be found contrary to law as a result of a final decision for which no appeal is processed, and which is binding on the parties to this Agreement, the parties agree to meet on written request of either party to negotiate to bring Section 2.6 into compliance with any such final decision, such negotiations to be limited to the provisions of Section 2.6 and will not affect the terms and conditions of this Agreement which shall remain in full effect for the life of this Agreement. [Emphasis added.]

The agency shop provision of the 1984-1987 collective bargaining agreement between Ferris and the FFA is identical in all respects to its immediate predecessor.

There are three principal differences between the early agency shop provisions and those in effect since November 19, 1981. The first difference is that under the present provision, Ferris does not discharge nonunion members for failure to pay the service fee. Rather, as authorized by Mich.Comp.Laws § 408.477, Ferris will now deduct the

appropriate service fee from the paycheck of the dissenting member of the bargaining unit after due notice and opportunity to comply. The second distinction of the modern agency shop provision is that the service fees are now computed as the equivalent to the amount of the dues required of FFA members, "less any amounts not permitted by law." The third and final major change is that dissenting members of the bargaining unit may now "object to the use of the service fee for matters not permitted by law" by utilizing the procedure "officially adopted by the Association."

Pursuant to stipulations and orders entered on April 21, 1983, and October 22, 1984, to avoid litigation expense and time, defendant unions have refunded, or agreed to refund, with simple interest, all service fees paid by plaintiffs, and waived any claims they might have had against plaintiffs for service fees not paid, for periods prior to the 1981-1982 fiscal year (September 1, 1981 to August 31, 1982). Pursuant to the stipulation and order entered April 21, 1983, plaintiffs have deposited with the registry of the court the MEA's and FFA's portions of the service fees demanded for the 1981-1982 and 1982-1983 academic and fiscal years; plaintiffs still in the bargaining unit are obligated during the pendency of this litigation to similarly deposit subsequent service fees after notice of the MEA and FFA portions; and defendant unions are enjoined from otherwise enforcing the agency shop agreement against plaintiffs during the pendency of this litigation. The amounts deposited with the court are: James P. Lehnert, Elmer S. Junker, James E. Lindsey and John R. Schauble, $455.00 each; Sam C. Peticolas, $215.00. No subsequent deposits have been made because the FFA has not given notice to plaintiffs of the appropriate amounts.

Also to avoid expense and time, the parties have further agreed that the issue of which union expenditures constitutionally are chargeable to plaintiffs shall be tried

only with regard to fiscal year 1981-1982. However, the proportions of the expenditures of defendant unions for various purposes during that year shall not be treated as representative of the proportions of their expenditures during subsequent fiscal years. During the 1981-1982 academic and fiscal year there were an average of approximately 502 full-time equivalent employees, including five of the plaintiffs, in the bargaining unit represented by the FFA.

In practice, the amount of the service fee certified to Ferris by the FFA (in cases where service fee payors have not asserted constitutional objections) has been equivalent to the amount of dues required of members of the FFA. Of course, under the agreement of April 25, 1979, mentioned above, plaintiffs have paid reduced service fees into an interest-bearing escrow account and no payroll deductions from their salaries have been made by Ferris since that time. Pursuant to and in furtherance of the governance documents of the FFA, MEA and the NEA, a substantial portion of the service fees collected from nonunion members of the bargaining unit has been and will continue to be transmitted by the FFA to the MEA and the NEA. In fiscal year 1981-1982 an individual's total dues (or service fee in the case of a nonmember not asserting a timely constitutional objection) amount of $284.00 was disbursed as follows: FFA, $24.80; MEA, $211.20; and NEA, $48.00.

In fiscal year 1981-1982, $10.00 of the MEA's portion of the service fee was placed in a Teacher Assistance Program (TAP) Fund. A major purpose of this TAP Fund was to provide direct financial assistance to teachers who were out of work permanently or temporarily as a result of a strike. After the decision in *Male v. Grand Rapids Education Ass'n*, 98 Mich.App. 742, 295 N.W.2d 918 (1980), *app. denied*, 412 Mich. 851 (1981), became final, the MEA acknowledged that the $10.00 portion of the

service fee allocable to the TAP Fund would additionally be considered nonchargeable for objecting nonunion employees. Union defendants' exhibit G additionally renders nonchargeable a portion of MEA staff time spent administering the TAP Fund.

Plaintiffs are not and have not been members of the FFA. Both before and after filing the instant action, and in their complaint itself, they notified the FFA, MEA and NEA of their objection to the use, even temporarily, of any portion of their service fees for purposes other than negotiating a collective bargaining agreement with the Board of Control, administering that agreement, and adjusting grievances arising under it. The MEA and NEA have spent and will continue to spend portions of service fee monies to support activities other than negotiating a collective bargaining agreement with the Board of Control, administering that contract and adjusting grievances arising under it. Although the parties agree that collective bargaining, contract administration and grievance adjustment occurring at bargaining units other than Ferris can affect collective bargaining, contract administration and grievance adjustment occurring at Ferris, the parties disagree as to whether the plaintiffs constitutionally may be required to support such activities occurring other than at Ferris.

The MEA and NEA have adopted procedures by which dissenting service fee payers, such as plaintiffs, may register their protest against the use of their money for certain purposes. The MEA Policy and Procedures Regarding Objections to Political-Ideological Expenditures, as revised by the MEA Board of Directors on August 6,

1982, is union defendants' exhibit J.[4] The NEA's Political

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[4]This procedure is central to the issues of this case and will be quoted in full:

POLICY REGARDING OBJECTIONS TO
POLITICAL-IDEOLOGICAL EXPENDITURES

Upon timely objection, no individual required to pay a service fee to a legal association affiliated with the Michigan Education Association (MEA) shall be required, through payment of such a fee, to contribute to the financial support of an ideological cause or political activity unrelated to collective bargaining, contract administration, grievance adjustment and employee representation, which he/she opposes. An individual who, in compliance with the administrative procedures established by the Executive Director of the Michigan Education Association (Executive Director), objects to the use of a portion of his/her service fee to support such an ideological cause or political activity shall be entitled to pay a reduced fee based upon the Executive Director's determination of the percentage of the MEA's annual budget spent for ideological or political purposes unrelated to collective bargaining, contract administration[,] grievance adjustment and employee representation.

OBJECTIONS TO POLITICAL-IDEOLOGICAL
EXPENDITURES
ADMINISTRATIVE PROCEDURES

Section I

Objections under the policy regarding Objections to Political-Ideological Expenditures ("the policy") shall be made by giving written notice to the Executive Director of the Michigan Education Association. Notice shall be given in writing during the period of September 1 through 15th of each year and shall specify those causes, programs and activities to which the individual objects, or that the individual objects to the use of a portion of her/his service fee for any political activity or ideological cause unrelated to collective bargaining, contract administration, grievance adjustment and employee administration. An objection must be renewed each fiscal year (September 1 to August 31).

Upon receipt of the objection, the Executive Director (or her/his delegate) shall determine first whether the cause, program, or activity to which the individual objects is in fact an ideological cause or political activity within the meaning of the policy. An ideological cause or political activity within the meaning of the policy is one which is unrelated to organizing, collective bargaining, contract administration, grievance adjustment or employee representative [*sic*]. Second, the Executive Director or

Activity Rebate Procedure, as last amended by the NEA

her/his delegate, if she/he determines that in fact the cause, program or activity to which the individual objects is an ideological cause or political activity, shall determine the pro rata amount of the individual service fee that has been expended upon or will be expended upon such cause, activity or program. If the individual has objected to a portion of her/his service fee for any political activity or ideological cause, as defined herein, the Executive Director or her/his delegate shall determine (1) the pro rata amount of the individual service fee that has been expended or will be expended on all such causes or activities and (2) the reduced fee accordingly required to be paid by the individual. Upon written request, the Executive Director or her/his delegate shall provide to the individual a copy of the approved budget for the year in question.

Section II

An individual dissatisfied with the determination of the Executive Director may appeal that determination to the Executive Committee of the Board of Directors of the Michigan Education Association. An appeal to the Executive Committee may be taken within 30 days of receipt of the determination of the Executive Director. The appeal shall be taken by giving a written notice to the Executive Director of the individual's desire to appeal her/his determination to the Board of Directors. The individual, along with her/his notice of appeal, may submit to the Executive Committee such written statements and other evidence in support of her/his position as she/he deems necessary. The Executive Committee shall reach a decision on the appeal as soon as practicable, preferably within 60 days for receipt of the appeal. If the individual is dissatisfied with the decision of the Executive Committee, she/he may further appeal by commencing, or otherwise being bound by, appropriate proceedings in the Michigan Employment Relations Commission.

Section III

These procedures apply to amounts remitted to the Michigan Education Association as well as amounts retained by the local association affiliated with the Michigan Education Association. The local associations shall reimburse the Michigan Education Association for any amounts rebated on its behalf under the policy.

Executive Committee on March 27, 1979, is plaintiffs' exhibit 1.[5]

The fiscal year 1981-1982 expenditures of the FFA from dues and service fee monies are set forth in Appendix A. Although the parties disagree as to the chargeability of many of the activities upon which the FFA, MEA and NEA expend service fee monies, they do agree on the general proposition that administrative or overhead expenses should be allocated proportionally between expenses (not including administrative or overhead expen-

[5]The NEA has adopted a procedure that is somewhat more complex than that implemented by the MEA. Initially, within 30 days after the NEA budget for a fiscal year is finalized, the Executive Director of the NEA computes a "preliminary political activity rebate" percentage which equals that percentage of NEA dues allocated for "political activity," as that term is defined in Section I.H. of the Exhibit. Copies of the NEA's political activity rebate procedure are posted by all NEA affiliates (i.e., FFA) and published annually in the NEA *Reporter* to give notice to nonmembers. Dissenting nonmembers of the NEA who make a timely objection to the use of any portion of their service fees for "political activity" are notified that the above mentioned percentage of their service fee has been placed in escrow and that the political activity rebate to which he or she is ultimately entitled will be sent to him or her not more than 30 days after the close of the fiscal year in question. The final political activity rebate percentage is computed by the Executive Director by applying the same analysis as above to the actual NEA expenditures for the past fiscal year. Included in the final political activity rebate sent to the dissenting nonmember is an explanation for any differences between the preliminary and final rebate figures, and an explanation of the steps to be taken to challenge the final determination.

Pursuant to the NEA procedure, appeal of the Executive Director's final determination is first taken to the NEA Executive Committee. That decision may be challenged by filing for binding neutral arbitration in Washington, D.C. The expenses of this arbitration are paid by the NEA. The arbitrator must adhere to the NEA's definition of "political activity" and may increase but not decrease the final rebate percentage. Alternatively, Section VII.E. of exhibit 1 provides that the dissenting service fee payor may challenge both the NEA rebate and the state affiliate's (e.g., MEA's) rebate under the appeal procedure adopted by the state affiliate.

ses) found by the court to be chargeable and those found not chargeable. The expenses of the MEA Building and Site Fund during fiscal year 1981-1982 are to be treated as overhead expenses.

B. Adjudicated Facts

1. Ferris Faculty Association-MEA-NEA

In the Fall of 1981, at the beginning of the 1981-1982 fiscal year, the FFA was engaged in the process of negotiating a new collective bargaining agreement with Ferris. Negotiations did not go smoothly and, as reflected in plaintiffs' exhibit 33, a letter from the President of the FFA to the President of the MEA dated October 8, 1981, the FFA was considering going out on strike. In response to this situation, the MEA conducted a "job action investigation" at Ferris.

Warren D. Culver, who in 1981-1982 was the statewide Director of the MEA's UniServ division, testified that the term "job action" is synonomous with "strike" and that the purpose of a job action investigation is to appraise the status of the ongoing negotiations, to determine the willingness of the local's membership to support a strike if necessary, and to put pressure on the employer by making outward preparations for a possible strike. The effectiveness of this third function as a bargaining tool is evidenced by Mr. Culver's testimony that only one out of every seven or eight job action investigations actually culminate in a strike. The remaining six or seven troublesome negotiations are resolved at the bargaining table short of a strike. The court finds Mr. Culver's testimony on this point to be credible.

In conjunction with the job action investigation undertaken at Ferris in the fall of 1981 the FFA, in conjunction with the MEA, established what the union

defendants designate a "crisis center;" plaintiffs call it a "strike headquarters." Once again referring to the credible testimony of Mr. Culver, the court finds that whatever label is attached to this facility, prior to a strike it serves as a meeting place for the local's membership, a base from which tactical activities such as informational picketing can be conducted, and serves to apply additional pressure on the employer by suggesting, whether true or not, that the local is prepared to strike if necessary. While the parties stipulated at the trial that the FFA did not engage in a strike in 1981-1982, Appendix A establishes that the FFA did expend a total of $3821.04 on the crisis center/strike headquarters. Appendix A also reflects that a total of $832.96 was spent for informational picketing, media exposure, signs, posters and buttons. In the negotiations period, these expenses are incurred for the purpose of informing the public of the issues involved in an attempt to bring public pressure to bear on the employer. This type of public opinion and support is very important during contract negotiations involving public sector labor unions such as the FFA given the nature of the employment and the funding available to the college.

The court also finds that $4788.77 was expended by the FFA during 1981-1982 on collective bargaining, contract ratification, negotiations training, and arbitration. Another $150 was spent for rent to hold membership meetings. A total of $1026.84 was used to send FFA representatives to the MEA and NEA Representative Assemblies. The FFA also spent $666.42 on the 13E Coordinating Council. That council is the UniServ unit for the separate bargaining units at Ferris State College and Central Michigan University.

In terms of FFA expenses for 1981-1982 related to political activities, Appendix A reveals that $149.99 was spent on the Preserve Public Education (PPE) Conference. There was much testimony given and many exhibits

received regarding the nature of the PPE program in 1981-1982. The court finds that this program was best summed up in the credible testimony of Warren Culver:

> The "Preserve Public Education Program" was an attempt on the part of the [MEA] to develop meaningful coalitions in the various communities so that we could pass millages, fight ballot issues, and do the kind of things that are absolutely necessary to fund public education, so that we have some reason to be able to continue to exist, bargain the contracts, and gain some benefit for our members.
>
> . . . .
>
> . . . I think that one of the most important things that has to be understood about public employee bargaining is that the amount of money that we get comes from either local property taxes, state taxes and some federal tax. And if we have no way of raising that money, which is all allocated through the legislative process or an election, then we have no way to bargain.
>
> So it is really the front line bargaining of our contracts.

Transcript of Culver Testimony at 4-5. Further, a total of $102.69 was expended for the purposes of lobbying the state legislature and attending an MEA Legislative Dinner. However, no attempt was made to identify the specific issues on which the FFA was lobbying with respect to these expenditures.

Finally, Appendix A states that $2500 was loaned by the FFA to another association in 1981-1982. At trial, it was stipulated that this was a no-interest loan made to the MEA local in the Hisperia School District to support it in a strike. It was further stipulated that this loan was repaid in full the following fiscal year. The remainder of the expenses of the FFA during 1981-1982 were administrative in nature.

2. Michigan Education Association

The MEA is a labor organization which, through 800-900 local affiliates such as the FFA, represents public school employees throughout Michigan. Like most public sector labor unions, it is a highly politicized organization, active in causes both related and unrelated to collective bargaining, contract administration and grievance adjustment. Prior to August 1981, the MEA had been divided into eight divisions. Four of these divisions were administrative in nature: General, Human Resources, Finance, and Internal Operations. The remaining four divisions were UniServ, Public Affairs, Professional Development and Human Rights (PDHR), and Program Development and Support.

The UniServ division was the MEA's main line of contact with the local affiliates. It also accounted for approximately 60% of the MEA's total budget. Basically, UniServ directors (of which there were 97 in 1981-1982) were responsible for delivering the full range of MEA services to the members of the local units. It appears from all the testimony received that these directors spent the majority of their time on activities directly related to collective bargaining, contract administration and grievance adjustment. Fu ther, the UniServ division included the Legal Services program. Through this program, the local associations were provided with legal representation on all employment-related matters. This service was provided on an "as needed" basis by private law firms and in-house counsel. UniServ also employed three negotiations specialists and two organizing specialists who were all supervised by the Director of Organizing and Negotiations.

The Public Affairs division was responsible for the lobbying activities of the MEA and for a majority of its communications and public relations activities. The MEA's

lobbying activities traditionally cover a broad spectrum of issues ranging from pursuing state and local aid for public education to supporting the Equal Rights Amendment. Much of this political activity was undertaken to insure that the state's public schools were adequately funded and the union's members would be able to negotiate beneficial contracts. Of course, any legislative activity in the area of Michigan's Public Employment Relations Act, which affects the MEA's ability to engage in collective bargaining, was closely monitored. Public Affairs also kept abreast of changes in federal laws and regulations which would impact on collective bargaining, contract administration and employee representation. In addition, the *Teacher's Voice*, the primary publication of the MEA reporting on all activities of the organization, was published by this division and distributed to all members of affiliated bargaining units. Finally, the Public Affairs division administered the association's political action committee—MEA-PAC.

The PDHR division engaged four of its eleven professional staffers as research consultants. These research consultants collected data on school finance, collective bargaining and other areas related to public school employment. They then prepared a negotiations data book used by the UniServ staff in bargaining contracts and maintained comprehensive statistics on contract settlements throughout the state. The research consultants also prepared prepackaged surveys for the local associations to use in polling their members to determine the members' interests and concerns going into negotiations. These surveys often concerned the comparability of terms and conditions of employment in surrounding or similar schools. This type of information is highly relevant to the development of bargaining demands. Research services were available to the locals on an as needed basis. In addition to the research consultants, the division also employed seven PDHR consultants. These consultants engaged in three primary areas: professional development

(including instruction, curriculum development and staff development), leadership training, and human rights.

The Program Development and Support division was primarily concerned with conventions and internal governance. The division's budget included the salaries of the MEA Division Directors, the Executive Director, the President and Vice-President, and the administrative assistants to these individuals.

In August 1981, the MEA Board of Directors approved a reorganization of the association's internal structure. That reorganization was completed by the end of the 1981-1982 fiscal year and resulted in the reduction of the number of budget divisions from eight to five. The reorganized budget still had a General category and four main institutional divisions. Uniserv remained the largest single division in the MEA although its size was reduced slightly and some of its smaller departments were transferred. Three new divisions were created: Administrative, Program Services, and Corporate Affairs.

The Administrative division had three primary program areas: the Department of Finance and Membership, the Department of Internal Operations, and the Department of Human Resources. The Program Services division began the 1981-1982 fiscal year with five departments: Government Affairs, Legal Services, PDHR, Organizing and Bargaining, and Membership Services. However, the Board of Directors eliminated Organizing and Bargaining as a separate department during that year; it is unclear whether those functions were then performed by some other department within Program Services or another division. Finally, the Corporate Affairs division was engaged in developing and delivering special services to the membership. Included in this division were the following: the Michigan Educators Financial Services Association (MEFSA) (providing individual economic

benefits and financial services to members), the Michigan Education Association Legal Services Plan (MEALS) (providing free legal services for members), and the Michigan Education Special Services Association (MESSA) (providing various insurance benefits for members).

Considerable testimony was offered concerning the financial and accounting systems utilized by the MEA. Most of this testimony revolved around the bi-annual budget. In the spring of 1980, a budget was approved by the MEA Representative Assembly covering fiscal years 1980-1981 and 1981-1982. However, as a result of a decline in MEA membership, a revised budget for the 1981-1982 fiscal year was developed by the Board of Directors and approved by the fall 1981 Representative Assembly. This revised budget is Union defendants' exhibit A. According to the testimony of Catherine Anderson, Director of Finance at the Michigan Education Data Network Association (MEDNA), a reorganized budget was subsequently prepared for 1981-1982 to reflect the administrative reorganization of the MEA during that year.

With respect to the MEA's revised 1981-1982 budget, the four divisions of an administrative nature had individual budgets of the following amounts: General, $425,629; Human Resources, $255,041; Finance, $632,400; Internal Operations, $1,257,300. In addition, the Building and Site Fund, which the parties stipulated would be treated as an administrative or overhead expense, was budgeted at $494,000 for that year. This results in a total budgeted administrative or overhead expense of $3,064,370. The remaining four divisions responsible for direct (as opposed to administrative) expenses had the following individual budgets: Program Development and Support, 1,551,300; UniServ, 11,453,700; Public Affairs and Communications, 1,373,200; and Professional Development and Human Rights, 973,600. Therefore, direct budgeted expenditures

for 1981-1982 were $15,351,800, and the overall MEA revised budget for that year was $18,416,170.[6]

When the MEA prepared its reduced fee calculations for 1981-1982, it acknowledged that most of its employees engaged in some activity that was arguably nonchargeable. Therefore, the association had its division and department directors estimate the approximate percentage of time that the average person in his or her area historically spent on nonchargeable activity. These time estimates were generally made after consultation with legal counsel, but rarely involved the review of contemporaneous hard data. Indeed, witness after witness testified that it was not and had not been the practice of MEA staffers to record the nature of their daily activities on time sheets. After these estimates of the percentage of nonchargeable time were prepared, a "cushion" was added to increase the effective nonchargeable percentage to cover any error. The final nonchargeable percentage was then applied to the annual dues of MEA members which were computed on the basis of the 1981-1982 revised budget. The results of this calculation are set forth in union defendants' exhibit G. Catherine Anderson testified that the MEA's records for 1981-1982 are insufficient to enable an independent certified public accountant to conduct an audit of union defendants' exhibits G and OOOO. Transcript of Anderson Testimony at 33-34.

At trial, the MEA continued to argue the validity of its final reduced fee calculation by presenting evidence regarding the estimated nonchargeable portion of its 1981-1982 revised budget. Although evidence of actual expenditures for that year, as opposed to budget figures, should have been available to the MEA, the only such

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[6]This figure excludes the MEA-PAC and TAP Fund which the Union defendants concede are completely nonchargeable.

evidence that was introduced was the schedule of expenses contained on the last page of plaintiffs' exhibit 613. Moreover, this schedule of expenses was formatted not on the revised budget for that year but on the *reorganized* budget.

Ms. Anderson also testified that actual total expenditures for any given year generally vary less than 2% from the total budgeted amount. However, she conceded that individual line items may vary by more than 2%. The court finds that Ms. Anderson's concession is an understatement. By reference to the actual versus budgeted figures for 1978-1979 and 1981-1982 listed in union defendants' exhibit A and plaintiffs' exhibit 613 respectively, it is clear that individual line items often vary considerably more than 2%.

The court was not at all aided in its calculation of a chargeable reduced service fee by evidence of estimated nonchargeable percentages of time and activity. Further, aside from the fact that exhibit 613 contains sparse detail of activity expenditures, the difference in the structures between union defendants' exhibits A and G (based on the revised budget) and plaintiffs' exhibit 613 (based on the reorganized budget) made an extrapolation of a reasonably accurate chargeable service fee impossible. For these reasons, I conclude that there are few instances indeed in which the MEA has established the chargeability of discrete actual expenditures.

The procedure by which the MEA implemented the service fee for nonunion objectors in 1981-1982 is set forth at note 4, *supra*. Recently, in the wake of the United States Supreme Court's Opinion in *Chicago Teachers Union v. Hudson*, ___ U.S. ___, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), a new policy and procedure regarding objections to the service fee was implemented. On May 7, the MEA Board of Directors adopted a new policy regarding objections to political-ideological expenditures. Shortly before

that, the Executive Director of the MEA adopted, upon the advice and recommendation of the Director of Legal Services, new administrative procedures to implement this policy. The new policy and procedures are currently in effect and are contained in union defendants' exhibit QQQQ. Due to their importance to the ultimate remedy in this case, they are also set forth in full in the margin.[7]

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[7] POLICY REGARDING OBJECTIONS TO POLITICAL-IDEOLOGICAL EXPENDITURES

Upon timely objection, no individual required to pay a service fee to a local association affiliated with the Michigan Education Association (MEA) shall be required, through the payment of such a fee, to contribute to the financial support of an ideological cause or political activity unrelated to collective bargaining, contract administration, grievance adjustment and employee representation, which he/she opposes. An Individual who, in compliance with the administrative procedures established by the Executive Director of the Michigan Education Association (Executive Director), objects to the use of a portion of his/her service fee to support such an ideological cause or political activity shall be required to pay a reduced fee based upon a determination of the percentage of the MEA's annual budgeted expenditures necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees.

OBJECTIONS TO POLITICAL-IDEOLOGICAL EXPENDITURES
ADMINISTRATIVE PROCEDURES

Section I

At the beginning of each fiscal year (September 1 to August 31), the Executive Director of the Michigan Education Association or his/her designee shall determine the amount of the MEA's total budgeted expenditures that will be expended on chargeable and nonchargeable activities. The Executive Director or his/her designee shall then calculate the reduced fee that an objector will be required to pay. By November 10 of each year, or as soon thereafter as possible, the Executive Director shall make available to all non-union employees information identifying the MEA's total budgeted expenditures and identifying the chargeable and nonchargeable budgeted expenditures. At the same time, the Executive Director shall make available information identifying the previous year's total budgeted expenditures, the year-end financial statements verifying the actual expenditures, and an analysis of the previous year's reduced fee calculation using the verified actual expenditures.

Section II

3. National Education Association

The NEA is a national voluntary labor organization of public school employees. The MEA is a state affiliate and the FFA is a local affiliate of the NEA. Through its various state and local affiliates, the NEA represents approximately 12,000 bargaining units nationwide. Like the MEA, the NEA is a highly politicized organization which engages in a variety of activities aimed primarily at promoting public education and public school employee welfare, in addition to improving the bargaining ability and position of its members and affiliates. The NEA is governed by the National Education Association Representative Assembly, Board of Directors and Executive Committee. Its actual expenses for 1981-1982 totaled $70,420,142.

Objections under the policy regarding Objections to Political-Ideological Expenditures ("the policy") shall be made by giving written notice to the Executive Director of the Michigan Education Association. Notice shall be given in writing during the period of September 1 through December 1 of each year and shall specify that the individual rejects the reduced fee calculation. An objection must be renewed each fiscal year.

Upon receipt of the written notice rejecting the reduced fee calculation, the Executive Director (or his/her designee) shall review the reasons, if any are given, for the rejection. The Executive Director will have 10 days to respond to the objector. If the Executive Director does not respond within the 10-day period it will be assumed that no merit was found in the individual's objection and the objector may proceed to the next step of this procedure.

Section III

An individual dissatisfied with the determination of the Executive Director shall appeal that determination by filing an Unfair Labor Practice Charge, or otherwise being bound by, appropriate proceedings in the Michigan Employment Relations Commission. If an unfair labor practice charge has not been filed by December 15, the union shall seek a reasonably prompt determination of the appropriate reduced fee by the Michigan Employment Relations Commission.

Section IV

Pending a decision of the Michigan Employment Relations Commission, the objector may be required to pay 100% of the reduced fee into an escrow account identified by the Executive Director.

At the outset, the court will make some findings regarding plaintiffs' claim that the NEA has waived its right to any and all service fees from these individual plaintiffs. It appears that in 1981, the NEA made some settlement offers to plaintiffs whereby the NEA would refund service fees collected and waive its right to some future fees in an attempt to avoid the prohibitively high expense of the instant litigation. Plaintiff Speerman, who had already retired at that time, accepted the NEA's offer of refund but the remaining plaintiffs did not. The parties could not agree on exactly what future fees were subject to the waiver and the settlement and release of the NEA did not transpire. Furthermore, plaintiffs were unwilling to forego their claim against the NEA for injunctive relief regarding its rebate procedures. In 1982, the court denied defendants' motion to dismiss for mootness on similar grounds. *Lehnert v. Ferris Faculty Ass'n-MEA-NEA*, 556 F.Supp. 309 (W.D.Mich.1982). Finally, on October 22, 1984, the plaintiffs and the NEA stipulated that the NEA would refund all pre-1981-1982 service fees in exchange for limited discovery and litigation solely as to the 1981-1982 school year. The court finds that this stipulation would have been meaningless had the parties thought that the NEA had waived its right to all service fees. Since plaintiffs offer no other evidence suggesting that the NEA has made such a waiver, the court expressly finds that the NEA has not waived its right to collect service fees from plaintiffs for any fiscal years from 1981-1982 forward.

From the evidence received at trial, the court finds that the NEA can be broken down functionally into 12 areas. Eight of those areas involve so-called direct expenditures: Affiliate Services, Communications, Government Relations, Human and Civil Rights, Instruction and Professional Development, Legal Services, Political Affairs, and

Research. The remaining four areas, Administration, Business and Finance, Data Processing, and Governance, can be characterized as administrative or overhead. A brief description of the role of those areas and their actual expenditures in 1981-1982 is taken from union defendants' exhibits EEEE, FFFF and GGGG.

The Affiliate Services area operates to deliver NEA programs to NEA affiliates in the field. This is accomplished through six NEA Regional Offices. The total 1981-1982 Affiliate Services expenditures of $27,498,475 are further broken down into the following eight general areas: membership promotion and recruitment, $2,042,482; leadership training, $1,177,354; staff training, $1,010,138; coordination of services to affiliates, $3,529,672; bargaining and negotiation support, $1,171,938; field support for legislation and political affairs, $778,792; organizing, $4,615,088; and UniServ, $13,173,011.

The mission of the Communications area is to provide internal and external communications to NEA leaders, members, potential members and the general public. Internal communication was effected primarily through the NEA's various publications. External communication was accomplished through the media. The Communications area expended a total of $7,904,237 in 1981-1982, $5,846,892 internally and $2,057,344 externally.

Through the Government Relations area in 1981-1982, the NEA lobbied Congress on various issues related to employment and public education, monitored the activities of the Reagan Administration and several federal agencies, coordinated its efforts regarding passage of the Equal Rights Amendment, and communicated pertinent information to the state and local affiliates. The Governmental Relations area spent $1,652,718 on its attempts to achieve federal legislation and $433,435 on monitoring the administration and agencies for a total of $2,086,153.

The Human and Civil Rights area is sometimes referred to as Teacher Rights. The area is responsible for developing and implementing programs to prevent violations of teachers' rights, to protect and defend teachers whose rights have been violated, and to increase the involvement of minorities and women in the NEA. In 1981-1982, the area expended $255,751 on programs and litigation to protect teacher rights, $649,692 to enhance civil rights in education, $474,797 to increase minority involvement, and $234,232 to enhance equal educational opportunity, for a total of $1,614,472.

The Instruction and Professional Development (IPD) area is responsible for assisting affiliates with the development and application of guidelines for licensure, accreditation and continuing education for teachers. It also provides training to teachers in numerous areas of professional and educational interest. With respect to higher education, it assists faculty in implementing guidelines to evaluate governance, tenure and academic freedom. The area's total 1981-1982 expenditures of $2,275,960 were divided as follows: professional excellence, $514,054; organizational excellence through IPD, $856,534; integrity in educational opportunities, $546,743; and national recognition for quality education, teaching and critical educational issues, $358,629.

The Legal Services area offers a variety of programs and activities designed to assist and protect members and affiliates in all types of legal matters. The area operates a unified legal services program, a subsistence loan program, offers liability insurance and assists states in establishing attorney referral programs. Total area expenditures for 1981-1982 were $7,174,718.

The Political Affairs area concentrates primarily on administering NEA-PAC and fostering individual involvement in campaigning and electoral politics. The area spent a total of $1,081,629 in 1981-1982. The NEA has agreed that this figure is nonchargeable.

The final area involving "direct" expenditures is Research. This area is responsible for gathering and analyzing data, developing and conducting surveys, providing consultant and technical services, and training affiliated staff and elected leaders. In 1981-1982, the Research area expended $1,377,730 on the research computer network, $284,814 on collective bargaining/benefits services, $320,771 on information services, $1,024,908 on surveys, and $548,695 on studies/special projects, for a total of $3,556,918.

The four areas responsible for administrative and overhead expenses, Administration, Business and Finance, Data Processing, and Governance, had total 1981-1982 expenditures of $17,227,585. Of particular note was the $1,408,670 spent by Governance on the 1982 NEA Representative Assembly.

As union defendants' exhibit L reflects, the NEA also computed its 1981-1982 political activity rebate by having its departmental area directors estimate the approximate percentage of time that staffers in their area spent on nonchargeable activity. Although certain NEA employees do keep daily time sheets of their activities, it is unclear to what extent this data was reviewed in making the nonchargeable estimates. Further, to a greater degree than the MEA, the NEA introduced into evidence data regarding actual expenditures for the fiscal year 1981-1982, as opposed to a mere budget. *See* union defendants' exhibits EEEE (financial statement as of August 31, 1982 with auditor's report) and GGGG (1981-1982 program accomplishment report). While the program accomplishment

report is the type of hard data necessary in litigation such as this to establish chargeable expenditures, very little relevant interpretive testimony was offered to clarify the individual line items.

II. ANALYSIS AND LEGAL CONCLUSIONS

A. Chargeable Expenditures

1. Applicable Law

In 1973, the Michigan legislature amended its Public Employment Relations Act (PERA) to expressly authorize an agency shop system for union representation of public employees.[8] The constitutionality of the amended Act was

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[8]In that regard, Mich.Comp.Laws § 423.210 now provides in pertinent part:

> (1) It shall be unlawful for a public employer or an officer or agent of a public employer (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section 9 [§ 423.209]; (b) to initiate, create, dominate, contribute to, or interfere with the formation or administration of any labor organization: Provided, That a public employer shall not be prohibited from permitting employees to confer with it during working hours without loss of time or pay; (c) to discriminate in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in a labor organization: *Provided further, That nothing in this act or any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative as defined in section 11 [§ 423.211] to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative. . . .*
>
> (2) It is the purpose of this amendatory act to reaffirm the continuing public policy of this state that the stability and effectiveness of labor relations in the public sector require, if such requirement is negotiated with the public employer, that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative by paying to

challenged in the Michigan courts and ultimately appealed to the United States Supreme Court. In *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), the Court held that an agency shop clause in a collective bargaining agreement between the Board of Education and the Detroit Federation of Teachers did not violate the first and fourteenth amendment rights of freedom of expression and association of non-union members of the bargaining unit who were required to pay service fees, at least insofar as the service fees were used to finance union expenditures for the purposes of "collective bargaining, contract administration, and grievance adjustment." *Id.* at 225-26, 97 S.Ct. at 1794. The Court also indicated that a service fee payor could not be required to fund union expenditures for political activity or ideological causes not germane to the union's duties as collective bargaining representative. *Id.* at 235-36, 97 S.Ct. at 1799-1800.

The *Abood* decision was not the first time that the Supreme Court had the opportunity to pass on the constitutional implications of union security provisions such as the agency shop. In *Railway Employees' Dept. v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed.2d 1112 (1956), the Court held that section 2, Eleventh, of the Railway Labor Act (RLA) as amended, 45 U.S.C. § 152, Eleventh, which authorized railway carriers and labor organizations acting as exclusive representatives of bargaining units to enter into union shop agreements,[9] did not violate the first and

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the exclusive bargaining representative a service fee which may be equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative. [Emphasis added.]

[9]A union shop arrangement, as opposed to an agency shop, allows the employer to hire freely but all employees must join the union within a specified period of time. *See generally Developments in the Law—Public Employment*, 97 Harv.L.Rev. 1611, 1726 n. 1 (1984)

fifth amendments to the Constitution. The Court acknowledged the congressional intent of eliminating the free rider problem by requiring those who enjoy the benefits of union representation to contribute to the support of the union. 351 U.S. at 231, 76 S.Ct. at 717. Further, the Court stated that such congressional action was a valid exercise of power under the commerce clause given the legitimate governmental interest in industrial peace and stabilized labor-management relations. *Id.* at 233-34, 76 S.Ct. at 718-19.

One question left undecided by the *Hanson* Court—whether the required payment of union dues in a union shop could be used to force support of ideological causes or political candidates, *see id.* at 238, 76 S.Ct. at 721—was decided several years later in *International Association of Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961). *Street* also involved a union shop under section 2, Eleventh of the RLA. In that case, the union had expended union funds, over the objection of dissenting union members, in the support of political causes to which plaintiff-dissenters were opposed. The Court held that the union's use of an employee's money, over his objection, "to support candidates for public office, and advance political programs, is not a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes." *Id.* at 768, 81 S.Ct. at 1800. Construing the RLA in such a way as to avoid constitutional issues, the Court held that the statute

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[hereinafter cited as *Developments*]. Nevertheless, under federal law, a union shop is the practical equivalent of an agency shop because the requirement of union membership is interpreted as the requirement of payment of fees and dues. *Abood*, 431 U.S. at 217 n. 10, 97 S.Ct. at 1790 n. 10 (citing *NLRB v. General Motors*, 373 U.S. 734, 742, 83 S.Ct. 1453, 1459, 10 L.Ed.2d 670 (1963)).

did not give the union this power. *Id.* at 768-69, 81 S.Ct. at 1799-1800.

A third case concerning the RLA, *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963), described the burden of persuasion in cases where objecting nonmembers challenge the chargeable service fee:

> Since the unions possess the facts and records from which the proportion of [nonchargeable] political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion. Absolute precision in the calculation of such proportion is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise. And no decree would be proper which appeared likely to infringe the unions' right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining and, as well, to expend nondissenters' such exactions in support of [nonchargeable] political activities.

Id. at 122, 83 S.Ct. at 1163-64. This language was quoted with approval in *Abood*, 431 U.S. at 239 n. 40, 97 S.Ct. at 1802 n. 40.

Subsequent to *Abood*, the Supreme Court decided yet another case involving section 2, Eleventh of the RLA. In *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984), the Court went beyond *Hanson, Street, Allen* and *Abood* and actually undertook to define the line between chargeable and nonchargeable union expenditures under the RLA. Applying the test of "whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues" *id.* at 448, 104 S.Ct. at 1892, the Court addressed six particular types of union expenditures: conventions, social activities, publications, organizing, litigation, and death benefits. In making this inquiry, however, the Court first construed the applicable provisions of the RLA in an attempt to avoid unnecessary constitutional issues. *See id.* at 444-45, 104 S.Ct. at 1890-91.

With respect to the first two categories of union expenditures, conventions and social activities, the Court held that the RLA allowed the expenditures to be charged to objecting service fee payors. The Court stated that periodic, national union conventions at which union officers are elected and overall union policies, including bargaining goals and priorities, are set, are necessary for the union to "maintain its corporate and associational existence." *Id.* at 448, 104 S.Ct. at 1892. For this reason, the Court held that conventions are necessary in order that the union may carry out its statutory function as exclusive representative, and therefore, the entire cost of such conventions are chargeable under the RLA. *Id.* at 448-49, 104 S.Ct. at 1892-93. As to the .7% of total union expenditures spent on social activities, the Court noted that these functions were formally open to nonmember employees and were otherwise important to the membership because they helped maintain "harmonious working relationships." *Id.* at 449, 104 S.Ct. at 1892-93. Although conceding that social expenditures were not central to the union's statutory function, the Court refused to hold that such *de minimus* expenditures were beyond the scope of the RLA. *Id.* at 449-50, 104 S.Ct. at 1893.

The Court also considered a portion of the amount of money expended by the union on publications sent to all employees—members and nonmembers alike—to be chargeable to objecting nonmembers. Such publications, the Court observed, are the union's primary means of reporting on its activities and communicating with represented employees on issues of mutual concern. The Court

held that the cost of such publications is chargeable under the RLA to the proportional extent that the publications report on chargeable activities. *Id.* at 450-51, 104 S.Ct. at 1893-94. Presumably, this calculation should be made on a column inch basis, *see id.* at 450, 104 S.Ct. at 1893; but absolute precision in the calculation is not required. *Allen*, 373 U.S. at 122, 83 S.Ct. at 1163.

Since the Court found that these three expenditures were chargeable under the RLA, it also had to consider whether charging for the same activities increased the degree of infringement of the first amendment rights of the objecting employees beyond that impingement inherent in the union shop and, if so, whether the additional infringement is adequately justified by the governmental interest in labor peace. As to the expenditures for social activities, the Court held that the only communicative aspect of the compelled subsidy was the fact that such activities were sponsored by the union—a fact that was already taken into consideration in allowing the union shop. Therefore, forcing the nonmember to subsidize such social activities in no way increased the degree of infringement of first amendment rights. *Id.* 466 U.S. at 456, 104 S.Ct. at 1896.

The Court recognized that conventions and publications presented more serious questions of communicative content. However, the small additional infringement of first amendment rights was justified by the legitimate governmental interest. The Court added that "[t]he very nature of the free-rider problem and the governmental interest in overcoming it require that the union have a certain flexibility in the use of compelled funds. 'The furtherance of the common cause leaves some leeway for the leadership of the group.' " *Id.* (quoting *Abood*, 431 U.S. at 222-223, 97 S.Ct. at 1793).

There was no explanation for the discrepancy in holdings that the union could charge for the entire cost of conventions under the statute and the first amendment, but only for the portion of union publications relating to chargeable activities. It is beyond peradventure that aspects of union conventions are devoted to activities considered nonchargeable under the Court's definition. Nevertheless, Justice Powell's separate Opinion clearly pointed out this anomaly so it cannot be argued that the Court's holding regarding the expenses of the convention was anything less than deliberate. *See id.* at 457, 104 S.Ct. at 1897 (Powell, J., dissenting in part).

The Court held that the union's expenditures for organizing efforts were completely nonchargeable under the RLA. Although organizing efforts outside the bargaining unit arguably are undertaken to make the union stronger and to bolster its bargaining ability, the connection between such efforts and collective bargaining was thought to be too tenuous. *Id.* at 451, 104 S.Ct. at 1893. With respect to intra-unit organizing, the Court stated flatly that "it would be perverse to read [the RLA] as allowing the union to charge to objecting nonmembers part of the costs of attempting to convince them to become members." *Id.* at 452 n. 13, 104 S.Ct. at 1894 n. 13.

In addressing the union's expenses related to litigation, the Court construed the RLA to impose two qualifiers on chargeability. First, it held that only litigation before agencies and in courts that "concerns bargaining unit employees and is normally conducted by the exclusive representative" is chargeable. *Id.* at 453, 104 S.Ct. at 1895. This includes, but is not limited to, litigation incident to bargaining, contract administration, grievance and dispute resolution, fair representation matters and inter-union jurisdictional disputes. The second qualifier to chargeability under the statute is that litigation expenses must be broken down on a unit-by-unit basis. *Id.* This

latter requirement is unique to litigation expenditures in the *Ellis* Opinion. Indeed, the requirement of a unit-by-unit breakdown of chargeable expenditures has never, to my knowledge, even been suggested in any of the Supreme Court's prior (or subsequent) union/agency shop decisions. Nevertheless, the Court offered no explanation of why the RLA required such a cost allocation and no rationale of why this type of allocation was appropriate to litigation expenses and no others.

With respect to the issue of the union's payment of death benefits to designated beneficiaries of deceased employees, the court of appeals in *Ellis* had held that since insurance benefits are a mandatory subject of bargaining, the union's decision to insure its own members rather than seek benefits from the employer was a legitimate tactical decision, "germane to the work of the union within the realm of collective bargaining." 685 F.2d 1065, 1074 (9th Cir.1982). The Supreme Court did not reach the issue because, at the time of the Opinion, the union was no longer the exclusive representative of the unit and the objecting nonmembers were no longer participating in the benefit system. The Court did, however, rule that the objecting nonmembers were not equitably entitled to a refund of their past contributions because they had enjoyed the benefit of insurance coverage. *Id.* at 454-55, 104 S.Ct. at 1895-96.

At least with regard to political or ideological expenditures of the union, there is a fundamental distinction between cases like *Hanson, Street, Allen* and *Ellis* involving private sector employment, and those like *Abood* and the case at bar involving public sector employment. The *Abood* Court recognized that this distinction is not to be found in the nature of the employee or in the work performed, but rather in the character of the employer. 431 U.S. at 229-30, 97 S.Ct. at 1796-97 (citing Summers, *Public Sector Bargaining: Problems of Governmental*

Decisionmaking, 44 U.Cin.L.Rev. 669, 670 (1975)). While *Street* and *Allen* appear to have settled the question whether political or ideological expenditures by the union can ever be chargeable to an objecting member of a private sector bargaining unit, the same reasoning does not necessarily apply in the public sector where the legislature and other political bodies are integrally involved in the collective bargaining process or otherwise directly impact on the terms and conditions of employment. *See Developments, supra* note 9, at 1732-33. The *Abood* Court did not rule on this point, but it nevertheless framed the issues:

> There will, of course, be difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited. The Court held in *Street*, as a matter of statutory construction, that a similar line must be drawn under the Railway Labor Act, but in the public sector the line may be somewhat hazier. The process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process.

431 U.S. at 236, 97 S.Ct. at 1800 (footnote omitted).

The leading post-*Abood* federal case on political expenditures by public sector unions is *Robinson v. New Jersey*, 741 F.2d 598 (3d Cir.1984), *cert. denied*, 469 U.S. 1228, 105 S.Ct. 1228, 84 L.Ed.2d 366 (1985). In that case, public employee plaintiffs challenged, *inter alia*, portions of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.1 *et seq.*, which allowed agency shop arrangements and authorized the use of service fees for support of certain lobbying activities directly related to collective bargaining, contract administration or the terms and conditions of employment, but not partisan political

activities or ideological causes only incidentally related to such functions. *Id.* 34:13A-5.5(b) and (c). Plaintiffs argued that such forced political support violated the first and fourteenth amendments. After a thorough discussion of the Supreme Court's RLA cases and the *Abood* decision, concentrating on the distinctive nature of public sector employment relations, the *Robinson* court concluded:

> So long as the lobbying activities are pertinent to the duties of the union as a bargaining representative and are not used to advance the political and ideological positions of the union, lobbying has no different constitutional implication from any other form of union activity that may be financed with representation fees.

741 F.2d at 609. *See also Cumero v. Public Employment Relations Board*, 167 Cal.App.3d 131, 145-46, 213 Cal.Rptr. 326, 336-37 (1985); *cf. Beck v. Communications Workers of America*, 776 F.2d 1187, 1210-11 & n. 31 (4th Cir.1985) (lobbying expenditures not chargeable in private sector union context).

Although the Third Circuit's decision in *Robinson* is not controlling in the instant case, I find the reasoning in that opinion very persuasive. Further, although the New Jersey statute at issue in *Robinson* provided explicitly that certain lobbying expenditures were chargeable by the union, and Michigan's PERA is silent on this issue, I do not think that the two statutes can fairly be distinguished in this respect. It appears that the New Jersey and Michigan legislatures had similar intents when passing their respective amendatory statutes—to foster the roles of exclusive representatives in the public employment sector and to promote labor peace by eliminating, to the greatest extent possible, the problem of "free riders" in the collective bargaining unit. *Compare Robinson*, 741 F.2d at 609-10 *with* Mich.Comp. Laws § 423.210(2) *and Abood*, 431 U.S. at 224, 97 S.Ct. at 1793 (discussing PERA).

431 U.S. at 224, 97 S.Ct. at 1793 (discussing PERA). Unlike PERA, the New Jersey statute was amended after, and with the benefit of, the Supreme Court's decision in *Abood*. If there is a distinction to be made between the two statutes, it is that PERA sought to make the full equivalent of ordinary union dues chargeable to the service fee payor while the New Jersey statute provided that the service fee could not exceed 85% of ordinary dues. *See* N.J.S.A. 34:13A-5.5(b). Therefore, it cannot be argued that the Michigan legislature did not intend for service fee payors in an agency shop to contribute to the cost of the union's lobbying activities to the extent that the activities are germane to the union's duties as bargaining representative and the compelled contribution is otherwise constitutionally permissible. In accordance with the foregoing discussion, I find that such lobbying expenditures are constitutionally chargeable to public sector service fee payors under PERA.

Another issue in contention is public sector organizing. As I have already discussed, the Supreme Court held in *Ellis* that expenditures related to organizing, both in and out of the bargaining unit, are nonchargeable under the RLA. The union defendants in the case at bar seek to distinguish *Ellis* on three grounds. First, they restate the importance of the distinction between public and private unions, and especially the inability of school employee unions in Michigan to engage in a lawful strike. These defendants argue that the relative strength of a public bargaining unit in this case is more directly connected to their ability to collectively bargain than in the *Ellis*, private sector union context because the threat of an illegal strike will be taken more seriously by the governmental employer if it knows that a greater percentage of the employees will support the strike. Secondly, the union defendants argue that the majority of the organizing conducted by them in 1981-1982 was aimed at school support personnel—not teachers. In other words, the unions were organizing

within the bargaining unit but not attempting to convince objecting nonmember teachers, such as the instant plaintiffs, to become members. *Cf. Ellis,* 466 U.S. at 451-52 & n. 13, 104 S.Ct. at 1893-94 & n. 13. Lastly, the union defendants distinguish the *Ellis* decision on this point because the Court's holding with respect to organizing was made under the RLA, not under the Constitution.

While these defendants' arguments regarding the differences between the organizing undertaken in the case at bar and that considered in *Ellis* are not entirely unpersuasive, this court is not convinced that the differences are so compelling as to justify a contrary conclusion. The *Ellis* Court stated, in unambiguous language, that it considered organizing efforts "aimed toward a stronger union" to have only an "attenuated connection with collective bargaining." *Id.* at 451, 104 S.Ct. at 1894. This court is satisfied that the constitutional standard of *Abood* requires a more direct connection. Accordingly, I hold that the union defendants' expenditures for organizing are not chargeable to the plaintiffs.

The final issue in contention is litigation expenses. As I have already stated, the *Ellis* Court construed the RLA in such a way as to require such expenses to be chargeable to service fee payors only where the litigation was related to the union's duties as exclusive representative *and* where it involved members of the service fee payors' bargaining unit. I fully recognize that the *Ellis* Court engaged in statutory interpretation in an effort to avoid the constitutional issue. By contrast, the constitutional question of the chargeability of public sector litigation expenses is squarely before this court. Though *Ellis* is not binding on this issue, the Supreme Court's statutory rationale ordinarily would be accorded the greatest persuasive weight in analyzing the constitutional requirements. However, I am deeply troubled by the complete lack of rationale offered for the *Ellis* requirement of a unit-by-unit breakdown. I

am also very concerned about the adverse implications of according constitutional significance to this particular statutory requirement and applying the new rule to the facts of the instant case.

The inconsistency of requiring only litigation expenses to be broken down by bargaining unit in determining chargeability is readily apparent. Much if not all litigation that is related to the union's duties as exclusive representative addresses issues of shared concern. *See Developments, supra* note 9, at 1731. Furthermore, since unions operate on a cost-sharing basis, extraordinary expenses incurred by any one unit in any given year are spread out over all units represented by the union. This cooperative cross-funding enables the union to effectively represent individual members and units in hard cases that will have an impact on the greater whole while maintaining stable dues levels. Since dues levels are incorporated as benchmarks for service fees in union/agency shop statutes, *see, e.g.,* 45 U.S.C. § 152, Eleventh; Mich.Comp.Laws § 423.210; N.J.S.A. 34:13A-5.5(b), service fees may not exceed ordinary union dues even in a situation where a disproportionately high percentage of the union's litigation expenditures for a given period are directly attributable to a particular bargaining unit. In other words, a unit-by-unit breakdown of litigation expenses, or any other expenditure, in a determination of the chargeable service fee—even assuming such a breakdown were possible or practicable from a cost effectiveness standpoint—would *logically* lead to drastic fluctuations in the amount of the service fee charged to the objecting nonmembers of individual units. Nevertheless, because most union/agency shop statutes tie the amount of the service fee to the amount of ordinary union dues, service fees can never legally exceed dues. Therefore, a unit-by-unit breakdown of chargeable expenditures would only exacerbate the free rider problem and thereby frustrate the governmental interest that the Court

has repeatedly recognized lies at the heart of statutes authorizing union/agency shops.

In addition to these general legal problems, imposing a constitutional requirement of a unit-by-unit breakdown of litigation (or any other) expenses would create an unreasonable and unmanageable administrative burden on the instant union defendants. The MEA has hundreds of affiliated local bargaining units; the NEA has thousands. Assuming *arguendo* that these bodies were able to break-out discrete expenses by bargaining unit—an assumption that is not warranted by the facts at trial—I have little doubt that the marginal revenue received from service fee payors would not justify the cost of modifying the existing accounting systems to accommodate the requirement. Thus, from a cost-benefit standpoint, a decree requiring a unit-by-unit breakdown of chargeable litigation expenses would be "likely to infringe the union's right to expend *uniform exactions* under the [agency] shop agreement in support of activities germane to collective bargaining . . . ." *Allen*, 373 U.S. at 122, 83 S.Ct. at 1164 (*cited in Abood*, 431 U.S. at 239 n. 40, 97 S.Ct. at 1802 n. 40.) In my opinion, such an extreme decree is not warranted by the Constitution or by logic under the facts of the case at bar.

2. Analysis

(a) Ferris Faculty Association-MEA-NEA

In reference to the stipulated 1981-1982 expenditures of the FFA listed in Appendix A, I conclude that the bargaining related expenses, the expenses associated with contract ratification and the negotiations training workshop, and arbitration fees, totalling $4,788.77, are unquestionably chargeable to plaintiffs. I similarly find that the $1,026.84 expended on the MEA and NEA Representative Assemblies is fully chargeable under *Ellis*. Plaintiffs seek to distinguish the *Ellis* decision on this point because the

instant conventions were those of "affiliated" unions and not the actual exclusive bargaining representative. However, the legal relationship between local bargaining unit representatives such as the FFA and their state and national affiliates such as the MEA and NEA is a matter of statutory interpretation. The Michigan Employment Relations Commission (MERC), the state administrative agency with the primary responsibility for contruing the requirements of PERA, has repeatedly found that "an affiliated bargaining unit is a different entity from a local, independent unit." *In re Bridgeport Spaulding Community Schools*, Nos. C79-J-353 & CU79 J-51, slip op. at 34 (A.L.J. Op. Feb. 24, 1986) (citing cases). Furthermore, the MERC Administrative Law Judge in *Bridgeport Spaulding* explicitly held that since the "union as affiliated is the exclusive representative" under PERA, the objecting service fee payor can be charged for the cost of the MEA and NEA Representative Assemblies under *Ellis*. *Id*. at 40. By the same rationale, the $666.42 spent by the FFA in sending representatives to the 13E coordinating council, where bargaining strategies and representational policies are developed for the UniServ unit composed of the Ferris State College and Central Michigan University bargaining units, is chargeable to plaintiffs.

The FFA lobbying expenditures were divided into three categories. I found that the PPE program was directed at securing funding for public education in Michigan. In a public sector bargaining unit where funding for employment positions, salaries and benefits is conditioned upon legislative appropriations, such lobbying is directly related to the statutory duties of the exclusive representative. *See Abood, supra; Robinson, supra.* Therefore, the $149.99 spent on the PPE Conference is chargeable to plaintiffs. As to the $102.69 expended by the FFA on lobbying the state legislature and the MEA Legislative Dinner, the union defendants failed to meet their burden of establishing that the nature of the issues concerned

were chargeable. While I do not doubt that funding and other chargeable issues were at least partially covered in these two expenditures, the unions have conceded that they also engaged in other ideological lobbying that is not so clearly chargeable under the *Abood/Robinson* rationale. Since the burden remains always with the union defendant to establish chargeability, I must conclude that none of the $102.69 spent on unexplained lobbying is chargeable to the plaintiffs.

With respect to the expenditures related to the contract negotiations difficulties encountered in 1981-1982, including those for the "crisis center/strike headquarters," informational picketing, advertising, and rent for membership meetings, I think the fact that the FFA did not engage in an illegal strike is of paramount importance. The question whether any of these expenditures may have been chargeable had a strike occurred is one that this court need not address. The "crisis center" never became a "strike headquarters" but still served a useful purpose in the negotiations process. The rent paid to hold membership meetings was necessary to keep the employees of the bargaining unit apprised of the progress of the negotiations and to get feedback on the members' demands. Likewise, the expenditures for disbursing information to the public that was favorable to the bargaining unit's position is well within the realm of reasonable and legal bargaining tactics in the public sector labor context. Therefore, I hold that the entire $4,804.00 expended by the FFA for these purposes is chargeable to the plaintiffs.

The final direct expenditure made by the FFA during 1981-1982 was the $2,500.00 no-interest loan made to support an affiliated local bargaining unit in a strike. The parties have stipulated that this loan was repaid in full in a subsequent fiscal year. I conclude that inasmuch as strikes by public employees are illegal under Michigan law, this expenditure was made in support of an illegal activity,

and hence, cannot be charged to the objecting nonmembers of the bargaining unit. I note only as an aside that had the loan proceeds been recouped during the 1981-1982 fiscal year and then re-expended on a chargeable activity, a different issue would have been presented. Since that is not the case, however, I will leave that issue for another court and another day.

In accordance with this discussion, I find that the FFA has established that 81% of its direct expenditures for 1981-1982 are chargeable to the plaintiffs. Pursuant to the aforementioned stipulation, that same percentage will be applied to the local's administrative expenses. In computing the chargeable service fee for the FFA for that year, the ordinary union member's dues amount, $24.80, is multiplied by the percentage of the total expenditures that are considered chargeable, in this case 81%. The resulting service fee to which the FFA is entitled from the plaintiffs for 1981-1982 is $20.09.

(b) Michigan Education Association

The MEA's theory of this case was that it could establish its chargeable service fee by identifying estimated percentages of time spent on admittedly nonchargeable activity, subtracting the resulting percentage from the overall budgeted expenditures for the year in question, and considering the remaining portion budgeted expenditures chargeable to the plaintiffs. The presentation of evidence at trial by the MEA was consistent with this theory. However, after reviewing the applicable Supreme Court decisions on point, I conclude that the evidentiary record created by the MEA in its case in chief is deficient in two respects.

As an initial proposition, it is no longer open to question that in establishing a service fee a union must identify the expenditures that it made in relation to

activities that are germane to duties as exclusive representative. *See Chicago Teachers Union v. Hudson*, ___ U.S. ____, 106 S.Ct. 1066, 89 L.Ed.2d 232, 247 (1986). The percentage of the overall union expenditures that the union establishes as chargeable is thus determined and that same percentage is applied to the amount of ordinary union dues, resulting in a constitutionally chargeable service fee.

It is not a truism, as the union defendants would suggest, that an admission of nonchargeable activity and time estimates is, by implication, competent proof of chargeable activity and time. As the *Hudson* Opinion explained, the first amendment requires that the union adequately disclose the nature of the activities for which it seeks to charge the objecting service fee payor. Since the burden of persuasion on the issue of the percentage of chargeable expenditures remains always with the union, and since the union possesses the facts and records from which this percentage is to be calculated, *see Allen*, 373 U.S. at 122, 83 S.Ct. at 1163, the union cannot shift the burden to the plaintiffs to cull through the unidentified but assumed chargeable activities in search of discrepancies. This type of erroneous burden shifting is not only unfair to service fee payors who object on the grounds of legitimate first amendment rights but also inevitably leads to the unmanageable and unnecessary pretrial discovery and attendant trial difficulties experienced by the parties and the court in the instant case.

The second deficiency in the evidentiary record created by the MEA regarding its service fee for 1981-1982 was with the basis for their calculations. As I have already described, the MEA relied primarily on "budgeted" figures instead of evidence of actual "expenditures." The Supreme Court has consistently held, at least since the 1963 *Allen* decision, that it is union expenditures that are in issue. While *Allen* also stated that "absolute

continually observed, *see Hudson*, 106 S.Ct. at 1076 n. 18, 89 L.Ed.2d at 247 n. 18, the question remains what degree of inaccuracy is tolerable. Under the particular circumstances of this case, I hold that the introduction of budgeted expenditures is not competent proof of actual expenditures.

Although this case was tried in 1986, the proofs at trial related exclusively to the 1981-1982 fiscal year. Therefore, this is not a situation in which the union was prevented by time constraints from marshalling its financial data regarding expenditures. To the extent that the union's then-existing accounting system did not enable it to breakdown chargeable from nonchargeable expenditures, it might still have identified major categories of chargeable expenditures with reasonable precision. By relying primarily on budgeted expenditures, which often vary considerably from actual expenditures when individual line items are compared, the court would be forced to speculate as to the accuracy of individual line items in the hopes that variables would average out in the end. This problem is, of course, exacerbated by the previously described differing budget formats between union defendants' exhibits A and G (based on revised budget) and plaintiffs' exhibit 613 (based on reorganized budget). Such speculation by the court, acting as the finder of fact, is impermissible. While a limited degree of imprecision is tolerable in calculating a service fee, the reliance on budgeted as opposed to actual expenditures under the circumstances of the instant case is too imprecise.

In reference to the actual expenditures set forth in the MEA's schedule of expenses for 1981-1982, exhibit 613, I find very few items which I can categorize as completely chargeable absent further relevant explanation. Two such expenses are the $212,959 for the MEA Representative Assembly and the $118,216 for the NEA Convention. Both expenditures were incurred by the Program Develop-

Assembly and the $118,216 for the NEA Convention. Both expenditures were incurred by the Program Development and Support division which is classified as a "direct expenditure" division. Both are clearly, chargeable to plaintiffs under *Ellis*.

The MEA's Program Services division, also a "direct expenditure" division, expended a total of $254,092 on the union's primary publication available to all bargaining unit members—the *Teachers' Voice*. Under *Ellis*, this expense is chargeable to the same extent that the publication reports on activity that is chargeable. All issues of Volume 59 of the *Teacher's Voice* for 1981-1982 were admitted into evidence. *See* plaintiffs' composite exhibit 612. Furthermore, plaintiffs' introduced a "marked copy" of a content analysis study which describes the nature of the contents of Volume 59 on a column inch basis. *See* plaintiffs' exhibit 594. I have reviewed both exhibits exhaustively and while I find the format and mathematical computations of exhibit 594 helpful, I have made an independent determination of the chargeable content of exhibit 612. My analysis reveals that 81.6% of Volume 59 of the *Teacher's Voice* relates to chargeable activity (see Appendix B for calculation). Therefore, of the $254,092 expended in 1981-1982 on that publication, 81.6% or $207,339.07 is chargeable to plaintiffs.

Due to the paucity of relevant evidence, I am unable to identify with any acceptable degree of accuracy any further discrete chargeable expenditures of the MEA for 1981-1982. I hasten to add that this should not be taken as an indication that the MEA did not engage in significant activity of a chargeable nature. This holding merely reflects my understanding of the current status of the law in this area and the union's failure to structure its proofs in accord with that law.

The sum of the three chargeable MEA expenditures identified above is $538,514.07. The total 1981-1982 MEA expenditures for the three "direct expenditure" divisions under the reorganized budget—Program Development and Support, UniServ, and Program Services—was $15,766,674. Therefore, considering the stipulation regarding direct and administrative expenditures, the proven chargeable percentage is 3.4%. The reduced service fee chargeable to plaintiffs in the instant case and for the 1981-1982 fiscal year is 3.4% of the ordinary MEA dues of $211.20, or $7.18.

(c) National Education Association

Like the MEA, the evidentiary presentation of the NEA was geared toward estimating the percentage of nonchargeable time and activities of NEA staffers. In contrast to the MEA, however, at least two exhibits were introduced which described in some detail the actual expenditures of the NEA for 1981-1982, *see* union defendants' exhibit EEEE and GGGG, the latter of which breaks down expenditures by programs or activities performed by the various departments or areas. Thus, while the court's calculation of the NEA's chargeable service fee is not aided by most of the testimony of NEA witnesses or by union defendants' exhibit L, which is a memorandum explaining the NEA's political activity rebate procedure and a compilation of memoranda from the various departmental areas estimating the nonchargeable percentages of time and activity, some discrete program expenditures are described in exhibit GGGG.

Due to the acknowledged partially ideological-political mission of the NEA, the vast majority of the identified program expenditures detailed in GGGG were either for a mix of chargeable and nonchargeable activity or were not sufficiently explained to determine their nature. Since there was very little testimony from NEA witnesses relat-

ing directly to this exhibit, the court has no clear way to break-out the chargeable from the nonchargeable in these mixed or ambiguous expenditures. Nevertheless, there are a few detailed expenditures that are exclusively for chargeable activity. With respect to these particular expenditures identified below, I hold that defendant NEA met its burden of persuasion that the program activity expenditure was properly chargeable.

Under the Affiliate Services area of exhibit GGGG, pp. 6-7, function 5.0 is entitled "Bargaining and Negotiation Support." Bargaining and negotiation expenses are the most easily identified chargeable amounts under any service fee standard. By reference to the columns for program description, "Program Accomplishment" and "Summary," it is clear to me that programs numbered 5.1, 5.2 and 5.3 identify chargeable activities. The total NEA expenditures for these three programs was $785,190. I do not consider the expenditure for program number 5.4 to be chargeable because it was partially in relation to job action situations. As I explained earlier in this opinion, whether certain expenditures for job actions are to be considered chargeable is a determination to be made on the basis of the particular fact situations. Since the total expenditures for program 5.4 was not sufficiently detailed by the NEA, I cannot consider any portion of it chargeable.

Under the Research area, pp. 39-41 of exhibit GGGG, function 2.0 is entitled "Collective Bargaining/Benefits Services." Again by reference to the first three columns, it is clear that programs 2.1, 2.2, 2.3, 2.4, 2.5 and 2.6 identify chargeable activities. Therefore, the entire $284,814 expended on this function is proportionately chargeable to plaintiffs. Also under the Research area, pp. 43-44, function 5.0 is entitled "Studies/Special Projects." Programs numbered 5.1 and 5.2 relate directly to studies of public school financing, an activity area that this

court considers chargeable. Therefore, the $395,801 expended on these two programs in 1981-1982 is proportionately chargeable to plaintiffs.

This short list exhausts the program expenditures in the eight so-called "direct expenditure" departmental areas of the NEA that this court can identify from the face of exhibit GGGG, other relevant exhibits and the sparse relevant testimony, as related exclusively to union activities that are clearly chargeable. The subtotal of the described chargeable program activity expenditures by "direct expenditure" areas is $1,465,805. This figure represents 2.75% of the total expenditure of $53,192,624 by the "direct expenditure" areas. While there are other program activities in the four "administrative expenditure" areas of Administration, Business and Finance, Data Processing, and Governance (*e.g.,* Administration program 1.5, and Governance function 1.0), the parties have stipulated to apply the same percentage of chargeable "direct" expenditures in determining the chargeable percentage for "administrative" expenditures.

In accordance with this discussion, I hold that the NEA has only established that 2.75% of its overall expenditures for 1981-1982 is proportionately chargeable to the plaintiffs. The NEA service fee that plaintiffs are required to pay for that year is 2.75% of the ordinary NEA dues of $48, or $1.32.

B. Constitutionally Required Procedure

1. Applicable Law

Until relatively recently, the law concerning the procedures to be used by unions in determining service fees in an agency or union shop was in a constant state of flux. The procedural problem is of fundamental importance because of the strong but conflicting public and

private interests involved. "[T]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective bargaining activities." *Abood*, 431 U.S. at 237, 97 S.Ct. at 1800.

In the early union shop decisions interpreting the requirements of the RLA, the Supreme Court focused on the duty of the dissenting member to object to political uses of his monies and speculated as to appropriate remedies for proven violations. In *Street*, the Court indicated that "dissent is not to be presumed," and at least implied that an objector would have to specify which specific political activities or causes he or she objected to. 367 U.S. at 774-75, 81 S.Ct. at 1802-03. The *Street* Opinion also suggested that an appropriate remedy might be an order to the union to rebate portions of service fees improperly collected and expended. *Id.* at 775, 81 S.Ct. at 1803. However, the Court made clear that since the objecting employees' "grievance stems from the spending of their funds for purposes not authorized by the Act in the face of their objection, not from the enforcement of the union shop agreement by the mere collection of funds," an injunction relieving objectors of all money due under the union shop agreement was inappropriate. *Id.* at 771, 81 S.Ct. at 1801.

Two Terms later in *Allen*, the Court clarified its intent that objectors need only state their objection to the expenditure of their service fees for *any* political purpose; "[i]t would be impractical to require a dissenting employee to allege and prove each distinct union political expenditure to which he objects." 373 U.S. at 118, 83 S.Ct. at 1162. The *Allen* Court stressed that the burden of proving the chargeable percentage rests fairly with the union inasmuch as the union, and not the employee, possesses the relevant facts and records. *Id.* at 122, 83 S.Ct. at 1163.

Lastly, in framing relief, the Court suggested that the union reduce future service fees from objectors by the amount of the past rebate and encouraged the union to adopt an "internal union remedy" to handle objections in years to come. *Id.*

Subsequently, in the *Abood* decision, the Court stated that the statutory protections for objectors available under the RLA were also required by the first and fourteenth amendment protections of freedom of speech and association. 431 U.S. at 233-34, 97 S.Ct. at 1798-99. Because the case came to the Court without a properly developed factual record, it had no specific remedy to review. Nevertheless, the court did suggest that a newly adopted internal union procedure involving rebate calculations made in the first instance by the union officials but ultimately subject to an impartial review might make further judicial proceedings unnecessary. *Id.* at 240-42 & nn. 41 and 45, 97 S.Ct. at 1802-03 & n.n. 41 and 45. In a separate opinion, an argument was proffered that "the Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Id.* at 244, 97 S.Ct. at 1804 (Stevens, J., concurring).

In the most recent RLA case, the Court held that a pure rebate scheme, first suggested in *Street*, "reduces but does not eliminate the statutory violation" where a portion of a service fee is used by the union for impermissible purposes. *Ellis*, 466 U.S. at 443-44, 104 S.Ct. at 1889-90. The Court analogized the pure rebate procedure to "an involuntary loan for purposes to which the employee objects." *Id.* at 444, 104 S.Ct. at 1889. The administrative convenience of such a procedure could not justify the statutory infringement given the availability of alternatives such as the "advance reduction of dues and/or interest

bearing escrow accounts, that place only the slightest additional burden, if any, on the union." *Id.*

Finally, in *Chicago Teachers Union v. Hudson*, ___ U.S. ____, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), the Supreme Court solidified the constitutional requirements for union procedures in an agency shop. At the outset, the Court stated that procedural safeguards are necessary for two reasons:

> First, although the government interest in labor peace is strong enough to support an "agency shop" notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement. Second, the nonunion employee—the individual whose first amendment rights are being affected—must have a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim.

Id. at ____, 106 S.Ct. at 1074, 89 L.Ed.2d at 244-45 (footnotes omitted). Given the important nature of the objecting employees' first amendment interests, the Court reaffirmed the need to assure that a dissenter's service fee is not used, even temporarily, for objectionable ideological causes not germane to the union's statutory function, and identified three additional constitutional requirements for a union's procedures for the collection of service fees. *Id.* at ___ - ____, 106 S.Ct. at 1075-78, 89 L.Ed.2d at 246-49.

The first additional requirement is that nonmembers must be given adequate information about the basis for the service fee calculation sufficient to enable them to assess the propriety of the calculation prior to the time for objection. The Court indicated that an adequate disclosure must identify and presumably justify the *chargeable* expenditures, rather than merely acknowledge nonchargeable expenditures and thereby treat the balance as chargeable by implication. *Id.* at ____ - ____, 106 S.Ct. at 1075-76, 89 L.Ed.2d at 246-47.

The second additional constitutional requirement is that the union procedure must "provide for a reasonably prompt decision by an impartial decisionmaker." *Id.* at ____, 106 S.Ct. at 1076, 89 L.Ed.2d at 247. While the Court acknowledged that as recently as *Abood* it had "suggested the desirability of an internal union remedy," *id.* n. 19, it was highly critical of the internal procedure of the Chicago Teachers' Union because the three steps of that procedure were entirely controlled by the union. *Id.* at ____, 106 S.Ct. at 1077, 89 L.Ed.2d at 248. The Court indicated that swift state judicial review of objections in the first instance was certainly one way to satisfy the constitutional requirement, but not the only way. *Id.* n. 20. A less burdensome method might be "expeditious arbitration . . . so long as the arbitrator's selection did not represent the union's unrestricted choice." *Id.* n. 21.

Finally, the Court addressed the union's self-imposed escrow of 100% of the objectors' service fees. While such an escrow eliminates the danger that a dissenter's funds might be temporarily used for objectional purposes, it alone does not render the procedure constitutional. The union must still provide an adequate explanation for the advance reduction of the service fee *and* provide for a reasonably prompt review by an impartial decisionmaker. *Id.* at ____ - ____, 106 S.Ct. at 1077-78, 89 L.Ed.2d at 248-49. The Court recognized that a compelled 100% escrow would deprive the union of immediate access to some funds to which it was "unquestionably entitled." *Id.* at ____, 106 S.Ct. at 1078, 89 L.Ed.2d at 249. Therefore, the Court stated that if the initial disclosure sufficiently identifies categories of expenditures that are clearly chargeable, fees proportional to those expenditures would not need to be escrowed. However, it held that both the identified chargeable expenditures and the limited escrow

figure itself would have to be verified by an independent audit of a certified public accountant. *Id.* at ____ & n. 23, 106 S.Ct. at 1078 & n. 23, 89 L.Ed.2d at 249 & n. 23. The Court's Opinion did not further explain this verification requirement. I must assume that it did not intend that the union's preliminary figures would have to be justifiable under generally accepted accounting principles. Such a requirement would be extraordinary given the Court's longstanding adherence to the *Allen* admonition that "[a]bsolute precision in the calculation . . . is not, of course, to be expected or required." 373 U.S. at 122, 83 S.Ct. at 1163 (*cited in Hudson*, at ____, 106 S.Ct. at 1076 n. 18, 89 L.Ed.2d at 247 n. 18).

2. Analysis

(a) Michigan Education Association and Ferris Faculty Association-MEA-NEA

The policies and procedures effective in 1982 for challenging the service fee calculations of the MEA and FFA are set forth in footnote 4, *supra*. In hindsight, it appears that these procedures were defective under the newly-announced *Hudson* analysis in many respects. Initially, the procedure offers no assurance that a dissenter's funds will not be temporarily used for an objectionable purpose. Secondly, an adequate disclosure of the basis for the reduced fee calculation was not made by the union prior to the time for objections. Further, after nonmembers requested such information, they were only given a copy of the approved budget for the year in question—this also constitutes inadequate information. Finally, the procedure did not provide a reasonably prompt decision by an impartial decisionmaker. Instead, the objector was forced to proceed through two levels of internal union review. This review seems pointless in a case where a nonmember objects to the use of his service fee for *any* nongermane ideological or political purpose.

Presumably the union has already decided what is and is not germane in computing the reduced fee. The final step of the procedure was "appropriate proceedings" in the Michigan Employment Relations Commission (MERC). However, while the *Hudson* Court stated that swift *judicial* review would suffice, "review" must logically be synonomous with "decision." In the instant case, the MERC Administrative Law Judge did not render her decision on related challenges to the MEA 1981-1982 reduced fee calculation until this year, just months shy of the instant opinion. While the federal court is certainly in no position to cast aspersions on the speed of MERC's decisionmaking process, this cannot be an example of the swift judicial review the Supreme Court had in mind.

I also have my doubts about the sufficiency of the revised MEA policies and procedures adopted this spring in the wake of the *Hudson* decision. *See* note 7, *supra*. First of all, the information disclosure is scheduled to be made by November 10, "or as soon thereafter as possible." Yet objections must be made on or before December 1. In the spirit of *Hudson*, I think it constitutionally required that nonmembers have *at least* two weeks after receipt of "adequate information about the basis for the proportionate share" in which to consider the information and make a reasoned decision whether to object. Furthermore, in order to assure that a dissenter's funds are not temporarily used for objectionable purposes, I hold alternatively that Ferris may not withhold agency funds from nonmembers' checks until after the time for objection has passed *or* that the union must place said funds in an independently controlled, interest bearing escrow account for said time period. As to the adequacy of the information disclosed, I cannot judge what I have not seen. I can only say that it will have to be a good deal more revealing than the evidence submitted at trial.

Assuming the preceding requirements are satisfied, the union must either deposit 100% of objectors' service fees into an independently controlled, interest bearing escrow account until such time as an impartial decisionmaker has rendered his final decision on the validity of the reduced fee calculation, *or* have their data for its reduced fee calculation and the data on which it bases its limited escrow verified by an independent audit by a certified public accountant. As a practical matter, I assume that such an audit would require some contemporaneous records detailing the activities on which MEA staffers spend their time. I would hope that such record keeping would not be so administratively burdensome as to compel the union to forego the service fees to which it is entitled. Certainly only major or substantial activities need be listed for purposes of satisfying the *Allen* accuracy requirements. In any event, since the union does not, according to the testimony received at trial, currently keep such time records, the 100% escrow option will likely be necessary for the time being.

Further, the court will need some assurance that the procedure provides for a reasonably prompt decision by an impartial decisionmaker. Even assuming that the union could secure MERC review of the reduced fee calculation on its own behalf and in the absence of a charging party, I hold that any decision that is not handed down before the end of the relevant fiscal year or soon thereafter is not "reasonably prompt." For these reasons, the union might be wise to secure an independent arbitrator, neutrally selected from a state-approved list of labor arbitrators. The MERC proceedings could then be more appropriately used in challenges to the final reduced fee amount after the relevant fiscal year when information on final expenditures for that year is available.

Finally, the MEA's revised policy and procedure differs from the original policy and procedure in note 4, *supra*, in

that it does not, by its own terms, apply to amounts retained by local affiliates such as the FFA. This may be an oversight, or it may be intentional. If it is intentional, the FFA must promulgate its own policy and procedure for handling objections to the reduced fee calculation that satisfies the constitutional requirements announced in *Hudson*.

(b) National Education Association

The NEA rebate procedure is also deficient under *Hudson* in several respects. This procedure is contained in plaintiffs' exhibit 1 and is discussed in note 5, *supra*. The most obvious flaw is that the method for determining the reduced fee or "rebate" amount is based upon an acknowledgement of nonchargeable, political activity rather than a justification of the chargeable activity and expenditures. If the information disclosed is otherwise adequate, the NEA's procedure for making that disclosure, set forth in § III of exhibit 1, is sufficient to pass constitutional muster. I would again require, however, that the NEA either forego collection of service fees from nonmembers until the objection time has passed or deposit such funds into an independently controlled, interest bearing escrow account for said time.

Furthermore, the NEA procedure does not provide for a reasonably prompt decision on the validity of the reduced fee calculation by an independent decisionmaker. In fact, no challenge is allowed under the procedure until after the end of the relevant fiscal year when the "final political activity rebate" figure is determined based on actual expenditures. As in *Hudson*, even a 100% escrow of the service fee will not justify this delay. The NEA must provide for an opportunity to challenge the advance reduction of dues, under the preliminary calculation, during the fiscal year in question. Once again, *Hudson* requires that anything short of a 100% escrow during this

time must be independently verified by an audit of a certified public accountant.

I also hold that the NEA's requirement that the independent arbitrator be bound by the union's definition of "political activity" contravenes constitutional requirements. The independent decisionmaker must be free to apply differing standards of chargeability as required by current law. The union cannot bind that decisionmaker to its own definition or standards in any way.

Finally, I note that § VII.E. of exhibit 1 provides that a nonmember employee who challenges the reduced fee calculations of both the NEA and a state affiliate such as the MEA may request that both challenges be processed by the state affiliate under its procedure. By the terms of this section, the NEA retains the discretion to affirm or deny such a request. Assuming that the state affiliate's procedure meets the *Hudson* requirements, granting such a request would certainly satisfy the NEA's burden of providing constitutionally sufficient challenging procedures.

C. Remedy

In accordance with the foregoing discussion in part II.A. of this opinion and the relevant findings of fact, I hold that the union defendants are entitled to the following amounts from plaintiffs James P. Lehnert, Elmer S. Junker, James E. Lindsey, Sam C. Peticolas and John R. Schauble, for agency shop service fees for 1981-1982, together with any interest earned on said amounts: FFA, $20.99; MEA, $7.18, NEA, $1.32. Said plaintiffs are entitled to restitution of the remainder of the reduced fee for 1981-1982 that is currently in escrow, in the amount of $186.41, together with any interest earned on said amount.

This judgment applies only to the service fee for the 1981-1982 fiscal year. The parties, however, filed a stipulation with the court on August 1, 1986, which details a mutually acceptable mechanism for determining the service fees due to the unions from plaintiffs for the four fiscal years subsequent to 1981-1982. This mechanism is based on the final chargeable percentages determined by the court in this case. In review, those percentages are: FFA, 81%; MEA, 3.4%; NEA, 2.75%.

In accordance with the foregoing discussion in part II.B. of this opinion and the relevant findings of fact, I hold that the procedures established by the union defendants for calculating the appropriate agency shop service fee for 1981-1982, and the procedures for challenging the calculation, were constitutionally inadequate under the newly announced *Hudson* standard. However, I find that plaintiffs were not damaged by these procedures, either in 1981-1982 or years subsequent, to any greater extent than the amount of the wrongfully assessed service fee.

Plaintiffs are required by law to contribute to the unions an agency shop service fee of whatever amount the unions can legally establish is chargeable. That amount has been determined by the court for 1981-1982 and the parties have stipulated to a method for calculating that amount for the four subsequent fiscal years. The "retroactive injunction" requested by plaintiffs based on the procedural inadequacies would effectively relieve them of their legal obligation to contribute to the support of the recognized exclusive representative. Such a "retroactive injunction" would not, in my opinion, redress the nature of the theoretical injury, to wit: the denial of the plaintiffs' first amendment interests in proper procedures. Therefore, this type of equitable relief would be inappropriate.

To the extent that plaintiffs have been injured, they are entitled to and will receive adequate compensatory damages. Plaintiffs are not entitled to damages for the value or importance of their first amendment interests in

proper procedures as a supplement to compensatory damages. *Memphis Community School District v. Stachura*, ___ U.S. ____, ____ - ____, 106 S.Ct. 2537, 2545-46, 91 L.Ed.2d 249, 261-62 (1986).

Of course, plaintiffs are entitled to a prospective injunction restraining the nonunion defendants from deducting any service fees from their paychecks until such time as the union defendants establish that they have adopted procedures that comply with the requirements of *Hudson*. These requirements are adequately explained above. With respect to the MEA and FFA, some amendment of their revised policies and procedures set forth in note 7, *supra*, is probably required. As to the NEA, significant amendment to their procedure contained in plaintiffs' exhibit 1 is required to bring it into compliance with the constitutional standard. As a partial alternative, the NEA may establish by affidavit or otherwise that future objections by plaintiffs will be processed through constitutional procedures adopted by the MEA. The court will retain jurisdiction in this case for the sole purpose of determining if and when the union defendants have adopted constitutional procedures. At that time, the court's injunction will be dissolved.

JUDGMENT ORDER

In accordance with the written opinion filed this date, and for the reasons stated therein;

IT IS HEREBY ORDERED that judgment shall enter in favor of each of the following plaintiffs, James P. Lehnert, Elmer S. Junker, James E. Lindsey, Sam C. Peticolas and John R. Schauble in the amount of $186.41, together with any interest accrued on this amount. This judgment shall be satisfied out of the escrow account established by the parties.

IT IS FURTHER ORDERED that the union defendants are entitled to the following amounts from each of said plaintiffs in satisfaction of plaintiffs' service fee obligations for the 1981-1982 fiscal year: FFA, $20.09; MEA, $7.18; NEA, $1.32, together with any interest accrued on these amounts.

IT IS FURTHER ORDERED that plaintiffs' service fee obligations for the four fiscal years subsequent to 1981-1982 shall be calculated in accordance with the stipulation filed with the court on August 1, 1986.

IT IS FURTHER ORDERED that the nonunion defendants are enjoined from deducting any future service fees from plaintiffs' salaries until further order of the court.

APPENDIX A

Direct Costs

Bargaining team salaries	$2,500.00
Bargaining team expenses	249.45
Bargaining team benefits	72.79
Bargaining—secretarial	28.88
Bargaining—miscellaneous	86.79
Contract ratification expenses	112.15
Negotiations training workshop	687.02
Arbitration fees	1,051.69
Crisis Center/Strike Headquarters*	
— rent	2,780.00
— insurance	91.00
— utilities	80.22
— telephone	632.45
— equipment	40.12

APPENDIX A—Continued

Direct Costs	
— petty cash fund	$197.25
Picketing—food	219.05
Picketing—mailing	26.60
Newspaper & radio advertising	446.10
Signs, posters, buttons	141.21
Rent—membership meetings	150.00
Loan to another association	2,500.00
Lobbying state legislature	55.89
MEA legislative dinner	46.80
Preserve Public Education Conference	149.99
13E Coordinating Council	666.42
MEA Representative Assembly	490.45
NEA Representative Assembly	536.39
Sub-total	14,038.71
Administrative	
Computer	4,137.15
Supplies	43.34
Mailing Permit	69.97
Executive Board expenses	44.46
Photocopying	3.60
Sub-total	4,298.52
Total FFA Expenditures 1981-1982	$18,337.23

*Plaintiffs and defendant unions disagree as to the use of this headquarters. Plaintiffs maintain that it was used to prepare for a possible strike, but defendant unions contend that it was a "Crisis Center."

APPENDIX B

Analysis Summary of Teachers' Voice
Volume 59

Category	Column Inches Total	Column Inches Chargeable
Collective Bargaining	779	779
Lobbying	1895.5	1816
Electoral Politics	1167	847.5
Ideological	508.5	0
Public Relations	405	405
Litigation	97	79
Strikes	143.5	0
Administrative	637.5	627
Newsletter Basics	—	proportional
Other Material	1977	1657.5
TOTAL	7610	6211

$$\frac{6211}{7610} = 81.6\%$$

APPENDIX C

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN DENYING MOTION FOR A PARTIAL NEW TRIAL AND TO ALTER AND AMEND JUDGMENT

June 17, 1987

James P. LEHNERT, Elmer S. Junker, James E. Lindsey, Sam C. Peticolas, John R. Schauble, and Theodore D. Speerman, Plaintiffs,

v.

The FERRIS FACULTY ASSOCIATION—MEA-NEA, Michigan Education Association, National Education Association of the United States, The Board of Control of Ferris State College, S. Eugene Bychinsky, Robert L. Ewigleben, Earl D. Gabriel, Robert P. Gerholz, Fran Harris, Delbert D. Long, Robert C. Redman, Thomas P. Scholler, Patricia M. Short, and Steven L. Thomas, Defendants.

File No. G 87-346 CA1.

United States District Court
W.D. Michigan.

June 17, 1987.

OPINION

ENSLEN, District Judge.

In 1978 plaintiffs filed their complaint alleging violations of 42 U.S.C. §§ 1983, 1985 and 1986. Plaintiffs alleged that they were required by state law to pay to defendants Ferry Faculty Association ("Unions") an agency shop fee in lieu of Union dues and that this fee was not applied by the Unions exclusively to purposes germane to their duties as collective bargaining representative for the bargaining unit. Plaintiffs sought both damages and injunctive relief against the Unions.

The matter was tried before this Court in January and April of 1986. The Court heard the testimony of twelve

(12) witnesses and accepted more than ninety (90) exhibits during the trial. On August 25, 1986, this Court issued an opinion pursuant to Rule 52(a) of the Federal Rules of Civil Procedure (Fed.R.Civ.P.), 643 F.Supp. 1306. The matter is presently before the Court on defendant Unions' motion for a partial new trial and to alter or amend judgment.

Defendants correctly point out that this Court found that in determining what Union activities were chargeable to agency shop fee payors the Court required that the defendant Unions prove actual, quantified chargeable costs. The Court further found that the burden was on defendants to do so except to the extent indicated in the Court's previous opinion. *See Lehnert v. Ferris Faculty Association—MEA-NEA*, 643 F.Supp. 1306, 1327-1330 (W.D.Mich. 1986).

Defendants argue that "under the circumstances as they unfolded at trial, including the Supreme Court's decision in *Hudson* which was issued after the Unions had offered the vast majority of their testimony, . . . it would be equitable for this Court to exercise its discretion and allow the Defendants the opportunity to supplement the record and provide the Court with the additional information it interpreted *Hudson* to require concerning actual expenditures." *See* Defendants' Brief in Support of Motion for Partial New Trial and to Alter or Amend Judgment at 4-5.

The defendants, in essence, ask this Court to "supplement" the record so that it can provide the Court with the evidence it found lacking in their proofs. Defendants further argue that the record already has established evidence of both the chargeable and nonchargeable activities of their organizations. Here the defendants are asking the Court to again review the testimony of Warren Culver, Robert Marshall and

Catherine Anderson. In addition, defendants request that Catherine Anderson be allowed to offer testimony on the actual expenditures as identified in Exhibit 630. The Court did not mention Exhibit 630 in its earlier opinion, and defendants maintain that "[t]he actual expenditure figures in Exhibit 630 should allow the Court to determine an appropriate chargeable amount." Defendants' Brief, *supra*, at 4.

Plaintiffs respond that the Court did not limit the Unions' presentation of evidence, but rather that the Unions consciously chose to limit their case to budget figures and estimates of time even though the plaintiffs asserted before and during trial that under the current state of the law defendants were required to prove chargeable costs from evidence of actual expenditures and contemporaneous time records. *See* Plaintiffs' Reply to Motion for Partial New Trial and to Alter or Amend Judgment at 1. Plaintiffs further point out that the nature of the Unions' burden of proof was stated as an issue in the pretrial order of January 14, 1985. (See Pretrial Order at 20-23). Moreover, plaintiffs argue that *Hudson* was issued on March 4, 1986, almost two months before the trial resumed on April 23, 1986 and, in any event, defendants could have asked for a continuance but chose, as a matter of trial strategy, not to do so.

The Court agrees with the plaintiffs that under the circumstances of this case it would be unfair to them at this point to allow defendant Unions a second chance to provide evidence concerning their actual expenditures. Further, the Court believes that it would be a waste of its resources. The Court believes its judgment was and is consistent with the law. Even assuming, *arguendo*, that *Hudson* was a "change in the law," there is nothing that indicates that under these factual circumstances it should not be applied retroactively. Moreover, the Court finds defendants' reliance on *Bridgeport Spaulding Community*

Schools, Nos. C79 J-353, CU79 J-51 (Feb. 24, 1986) unpersuasive. *Bridgeport* is a decision by a state administrative law judge with respect to a federal constitutional issue, and as such, it is of little assistance to this federal court.

Finally, the Court finds plaintiffs' reliance on *duPont v. United States*, 385 F.2d 780 (3d Cir.1967) misplaced. The trial court in *duPont* found a failure of proof with respect to a ground which was not raised by defendant at trial, but rather was raised for the first time by the court itself. This case more closely resembles *Bell Telephone Laboratories, Inc. v. Hughes Aircraft Co.*, 73 F.R.D. 16, 20 (D.Del.1976), *aff'd* 564 F.2d 654 (3d Cir.1977), *cert. denied*, 435 U.S. 924, 98 S.Ct. 1489, 55 L.Ed.2d 518 (1978). The *Bell* court noted that "a party cannot request relief from the court for its own errors in judgment, when the strategy of litigation was based on conscious and informed choices." *Bell*, 73 F.R.D. at 22. *See also Rue v. Feuz Construction Co.*, 103 F.Supp. 499, 502 (D.D.C.1952).

Plaintiffs emphasize, and the Court agrees, that because defendant Unions have failed to maintain contemporaneous hard data, reopening the case will essentially be a waste of time and would be unfair to plaintiffs.

Defendants assert that Exhibit 630 contains actual expenditures from which the Court should be able to determine an appropriate chargeable amount. Here defendants are arguing that because the Court found 81% of the *Teacher's Voice* activities to be chargeable, the Court should be able to determine an appropriate chargeable figure for staff costs associated with the *Teacher's Voice*. The defendants are apparently suggesting that the Court simply conclude and calculate that 81% of the line expenditure for staff costs in Exhibit 31 are chargeable.

Plaintiffs point out that while the Court did conclude that 81% of the contents of the *Teacher's Voice* was chargeable in 1981-82, that fact alone does not allow the Court to determine an appropriate chargeable figure for staff costs associated with the *Teacher's Voice* because the staff who published the newspaper had other duties—some of which, at least, are *nonchargeable*. *See e.g.*, Plaintiffs' Exhibit 612, 9/7/81 at 4 *with* Plaintiffs' Exhibit 79 *and* Plaintiffs' Exhibit 615 at 11 *and* Defendants' Exhibit G at 3, ¶ 9 (Elwood Landis, editor of *Teacher's Voice*, was staff representative to the Distinguished Service Awards Committee; the MEA conceded that its awards program "was arguably non-chargeable," and the report of the committee in question shows no relationship to bargaining). *See* Plaintiffs' Brief, *supra*, at 5.

Moreover, Exhibit 630 to some extent incorporates estimates of nonchargeable time. *See* especially testimony of Irving B. Ross, C.P.A. indicating that Exhibit 630 did not change his professional opinion that the Unions' reduced fee calculations could not be relied upon because of the use of estimates and budgeted amounts.

The Court admits that the Audited Balances column of 8/31/82 in Exhibit 630 appears to satisfy, at least, Mr. Ross's objections. Still, as the Court has already indicated, even recalling Catherine Anderson would not establish the contemporaneous records that the Court finds necessary in this instance to meet the defendants' burden of proving chargeable time. Ms. Anderson was not an employee of MEA until September 1982, i.e., *after* the fiscal year in question. The Court believes that the additional evidence which defendants propose to offer would involve more of the same speculations and "soft data" which it has previously rejected.

Similarly, the Court rejects defendant Unions' contention that the record contains evidence that 100% of

the time of the higher education consultant, the retirement consultant, and the research consultants is spent on chargeable activities. *See e.g.,* Transcript of Marshall Testimony at 115 (Jan. 15, 1986) (higher education consultant involved in organizing in 1981-82); Plaintiffs' Exhibit 73 at F-4 (retirement consultant involved in lobbying and political action); Plaintiffs' Exhibit 616, 1/5/82 at 5, 3/15/82 (research staff involved in lobbying, political surveys, and organizing). *See* Plaintiffs' Brief, *supra*, at 4.

Finally, with respect to the question of UniServ staff time, the testimony of Warren Culver and Robert Marshall were *ex post facto* estimates—and again there was no contemporaneous hard data which would satisfy MEA's burden of proof.

Accordingly, for all the reasons cited above, the Court finds no reason to open the record and/or to grant a partial new trial and will enter an order denying defendants' motion for a partial new trial and to alter or amend judgment.

APPENDIX D

JUDGMENT ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

June 17, 1987

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

JAMES P. LEHNERT, ELMER S. JUNKER, JAMES E. LINDSEY, SAM C. PETICOLAS, JOHN R. SCHAUBLE, and THEODORE D. SPEERMAN,

Plaintiffs,

87 JUN 17
CLERK, U.S. DIST. COURT
WESTERN DIST. OF MICH.
BY ra

v

THE FERRIS FACULTY ASSOCIATION-MEA-NEA, MICHIGAN EDUCATION ASSOCIATION, NATIONAL EDUCATION ASSOCIATION OF THE UNITED STATES, THE BOARD OF CONTROL OF FERRIS STATE COLLEGE, S. EUGENE BYCHINSKY, ROBERT L. EWIGLEBEN, EARL D. GABRIEL, ROBERT P. GERHOLZ, FRAN HARRIS, DELBERT D. LONG, ROBERT C. REDMAN, THOMAS P. SCHOLLER, PATRICIA M. SHORT, and STEVEN L. THOMAS,

File No. G 78-346 CA1

Defendants.

_____/

JUDGMENT ORDER

In accordance with the opinion entered June 15, 1987;

IT IS HEREBY ORDERED that defendants' motion for partial new trial and to alter or amend judgment is DENIED.

DATED in Kalamazoo, MI: /s/
RICHARD A. ENSLEN
U.S. District Judge

June 15, 1987

APPENDIX E

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT GRANTING LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME

September 19, 1989

NO. 87-1700

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES P. LEHNERT, ET AL.,	:	
	:	
Plaintiffs-Appellants	:	FILED
	:	SEP 19 1989
vs.	:	LEONARD GREEN, CLERK
	:	
THE FERRIS FACULTY ASSOCIATION, ET AL,	:	ORDER
	:	
Defendants-Appellees	:	
	:	
THE BOARD OF CONTROL OF FERRIS STATE COLLEGE, ET AL.,	:	
	:	
Defendants	:	

Upon consideration of the motion of the appellants for leave to file their petition for rehearing one day out of time,

It is **ORDERED** that the motion be, and it hereby is, **granted**.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

/s/

APPENDIX F

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING REHEARING

November 7, 1989

NO. 87-1700

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES P. LEHNERT, ET AL.,	:	
	:	
Plaintiffs-Appellants,	:	FILED
	:	NOV 7 1989
v.	:	LEONARD GREEN,
	:	CLERK
THE FERRIS FACULTY	:	
ASSOC., ET AL.,	:	ORDER
	:	
Defendants-Appellees,	:	
	:	
THE BOARD OF CONTROL OF	:	
FERRIS STATE COLLEGE,	:	
ET AL.,	:	
	:	
Defendants	:	

BEFORE: MERRITT, Chief Judge; MARTIN and MILBURN, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

APPENDIX G

RELEVANT PARTS OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT, MICH. COMP. LAWS §§ 423.201-.216

Relevant Parts of the
Michigan Public Employment Relations
Act, Mich. Comp. Laws §§ 423.201-.216

423.202 Public employee; definition; strike prohibited.

Sec. 2. No person holding a position by appointment or employment in the government of the state of Michigan, or in the government of any 1 or more of the political subdivisions thereof, or in the public school service, or in any public or special district, or in the service of any authority, commission, or board, or in any other branch of the public service, hereinafter called a "public employee," shall strike.

423.210 Prohibited conduct; service fee.

Sec. 10. (1) It shall be unlawful for a public employer or an officer or agent of a public employer * * * (c) to discriminate in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in a labor organization: Provided further, That nothing in this act or in any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative as defined in section 11 to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative * * * .

(2) It is the purpose of this amendatory act to reaffirm the continuing public policy of this state that the stability and effectiveness of labor relations in the public sector require, if such requirement is negotiated with the public employer, that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative by paying to the exclusive

bargaining representative a service fee which may be equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative.

423.211 Public employees: designation of bargaining representatives; grievances of individual employees.

Sec. 11. Representatives designated or selected for purposes of collective bargaining by the majority of the public employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the public employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment, and shall be so recognized by the public employer: Provided, That any individual employee at any time may present grievances to his employer and have the grievances adjusted, without intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect, provided that the bargaining representative has been given opportunity to be present at such adjustment.

423.215 Collective bargaining; duties of employer and employees' representative; subjects and limitations.

Sec. 15. A public employer shall bargain collectively with the representatives of its employees as defined in section 11 and is authorized to make and enter into collective bargaining agreements with such representatives. For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract, ordinance or resolution incorporating any agreement

reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

APPENDIX H

RELEVANT PART OF MICHIGAN COMPILED LAWS § 408.477

Relevant Part of Michigan Compiled Laws § 408.477

408.477 Deductions from wages.

Sec. 7. With the exception of those deductions required or expressly permitted by law or by a collective bargaining agreement, an employer shall not deduct from the wages of an employee, directly or indirectly, any amount without the full, free, and written consent of the employee, obtained without intimidation or fear of discharge for refusal to permit the deduction. * * *

Supreme Court, U.S.
FILED
APR 2 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1217

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

JAMES P. LEHNERT, *et al.*,
Petitioners,

v.

THE FERRIS FACULTY ASSOCIATION-MEA-NEA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court below erred when it concluded, based on the factual findings of the District Court, that expenditures for certain activities engaged in by the respondent unions were "normally or reasonably employed to implement or effectuate the duties of" the exclusive representative, *Ellis v. Railway Clerks*, 466 U.S. 435, 488 (1984), so as to be constitutionally chargeable to objecting service (*i.e.*, agency) feepayers.

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Respondents Ferris Faculty Association-MEA-NEA ("FFA"), Michigan Education Association ("MEA"), and National Education Asssociation ("NEA") submit this brief in opposition to the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

Background

Since at least 1975, FFA has been recognized under the Michigan Public Employment Relations Act, Mich. Comp. Laws § 423.211, as the exclusive representative

for a bargaining unit consisting of faculty at Ferris State College, which is a public institution of higher education in Michigan. FFA is a local affiliate of MEA at the state level and of NEA at the national level. MEA and NEA are labor organizations which, through a network of local affiliates such as FFA, represent and provide services to employees of public schools, colleges and universities throughout Michigan (in the case of MEA) and the nation (in the case of NEA).

During the 1981-82 academic year, which is the year at issue here, petitioners were included in the 502-employee bargaining unit represented by FFA, but did not join FFA. The collective bargaining agreement that was in effect during that year included a service-fee provision, pursuant to which all employees in the bargaining unit who did not choose to become members of FFA were required to pay a service fee "equivalent to the amount of dues uniformly required of members of [FFA], less any amounts not permitted by law." Appendix to Petition for a Writ of Certiorari ("Pet. App.") at 21a. As a local affiliate of MEA and NEA, FFA has a "unified membership structure"—*i.e.*, if an employee chooses to become a member of FFA, he or she also must become a member of, and pay dues to, MEA and NEA. Pet. App. at 19a.

The service fee during the 1981-82 academic year for employees in the FFA bargaining unit who did not assert a timely objection to the amount of the fee was $284.00, which corresponded to the full "unified" dues paid by members. Of that amount, $24.80 was disbursed to FFA, $211.20 to MEA, and $48.00 to NEA. Pet. App. at 24a. Feepayers who objected to paying the full amount of the fee could pay a reduced fee determined through a procedure established by the unions.[1]

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[1] In the courts below petitioners challenged certain aspects of the unions' procedure, but this challenge is not pursued in the Petition.

Petitioners brought suit under 42 U.S.C. § 1983, contending that the service fee included the costs of certain expenditures for which objecting feepayers could not constitutionally be charged. Placing a strict burden of proof on the respondent unions, *see* Pet. App. at 61a-62a, 84a-86a, the District Court concluded that the unions had established the chargeability of only 2.75% of the NEA portion of the fee, 3.4% of the MEA portion of the fee, and 81% of the FFA portion of the fee, Pet. App. at 60a, 64a, 66a, for a total chargeable fee for the 1981-82 academic year of $28.59, as contrasted with the full "unified" membership dues of $284.00. Pet. App. at 75a, 78a. (In reaching these conclusions the District Court acknowledged that the unions may in fact have expended a significantly greater portion of their budgets for chargeable activities, but it held that they had failed to carry their burden of proof in this regard. Pet. App. at 59a, 63a, 64a-66a.)[2] The reduced percentages calculated for 1981-82 also were used by the court to establish the fee that could be charged to petitioners for the four subsequent academic years involved in this case. Pet. App. at 75a-76a, 78a.

Although the District Court ruled that petitioners were entitled to an approximately 90% reduction of their service fee, it included as chargeable seven activities which, in petitioners' view, cannot constitutionally be charged to objecting feepayers. The court's rulings with regard to these seven activities were affirmed by the Court of Appeals, and petitioners now challenge them before this Court. The seven activities in question, and the findings below with respect to them, are as follows.

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[2] The court denied the unions' request for an opportunity to supplement the record with more detailed evidence on these points. Pet. App. at 82a-86a.

1. *Activities Not Conducted Exclusively for Petitioners' Own Bargaining Unit*

MEA and NEA engage in numerous activities to assist their local affiliates such as FFA. Often those activities are not directed at any particular local bargaining unit, but are for the benefit of employees in *all* units, as, for example, when MEA works "to obtain funds for public education generally." Pet. App. at 9a. Other types of services—for example, assistance in collective bargaining—are available at all times to all units, but are provided to individual units only as the need arises. Pet. App. at 32a, 33a, 41a, 42a, 43a. MEA and NEA do not provide these or other services on a "pay-as-you-go" basis; instead, all feepayers in all units are charged equally, on what the District Court characterized as a "cost-sharing basis." Pet. App. at 56a. Petitioners challenged this aspect of the fee-setting process, contending that they should be charged on a year-by-year basis for only those specific services that are provided directly to the FFA bargaining unit in a particular year.

In rejecting petitioners' contention, the District Court found as fact that petitioners' approach "would logically lead to drastic fluctuations in the amount of the service fee charged to the objecting nonmembers of individual units." Pet. App. at 56a (emphasis omitted). And, because state statutes typically provide that service fees can never exceed membership dues even in years where the local bargaining unit receives an extraordinarily high level of services, the court found as fact that "a unit-by-unit breakdown of chargeable expenditures would only exacerbate the free rider problem and thereby frustrate the governmental interest that the [Supreme] Court has repeatedly recognized lies at the heart of statutes authorizing union/agency shops." Pet. App. at 56a-57a.

Based upon the evidence, the court further found that it probably would not be possible for NEA and MEA to "breakout discrete expenses by bargaining unit," Pet.

App. at 57a, but that even if it were possible to make such a unit-by-unit breakdown, this "would create [such] an unreasonable and unmanageable administrative burden on the instant union defendants" that the unions would likely have no choice but to forgo collecting amounts to which they are lawfully entitled. Pet. App. at 57a.

The District Court ruled that petitioners' demand for a unit-by-unit breakdown of MEA and NEA expenditures was "not warranted by the Constitution or by logic under the facts of the case at bar." Pet. App. at 57a. The Court of Appeals affirmed. Noting that the expenditures in question "were pertinent to the unions' duties as bargaining representatives," Pet. App. at 11a, the court concluded that the District Court's ruling was consistent with this Court's decision in *Ellis v. Railway Clerks*, 466 U.S. 435 (1984). Pet. App. at 10a-11a.

2. *Lobbying to Obtain Funding for Public Education*

The District Court held that objecting feepayers may lawfully be required "to contribute to the cost of the union's lobbying activities *to the extent that the activities are germane to the union's duties as bargaining representative.*" Pet. App. at 54a (emphasis added). Applying that test, the court declined to approve the chargeability of most of the unions' lobbying activities, finding that the unions had not carried their burden of proof as to the germaneness of those activties. Pet. App. at 58a-59a, 62a-64a, 64a-66a, 85a-86a. The court did, however, approve the chargeability of expenditures for lobbying designed to obtain increased funding for public education, and it did so in two contexts.

First, the court approved direct expenditures for the MEA's Preserve Public Education ("PPE") Program. Finding as fact that the PPE Program was devoted to obtaining increased funding for public educaiton, Pet. App. at 31a, the court characterized the program as "really the front line bargaining of [the unions'] con-

tracts," because "if [the unions] have no way of raising that money, which is all allocated through the legislative process or an election, then [they] have no way to bargain," *id.* The court concluded that "[i]n a public sector bargaining unit where funding for employment positions, salaries and benefits is conditioned upon legislative appropriations, such lobbying [*viz.*, lobbying 'directed at securing funding for public education in Michigan'] is directly related to the statutory duties of the exclusive representative." Pet. App. at 58a.

The Court of Appeals affirmed the District Court's conclusion, rejecting petitioners' contention that they could not be charged for the PPE Program lobbying because "such lobbying was not directly concerned with Ferris State College and the Ferris Faculty Association." Pet. App. at 9a. "It is unrealistic," the court stated, "to expect a union, when lobbying a state legislature for funds for public education, to lobby for monies to support each specific institution separately." *Id.* Accordingly, the court held that lobbying to obtain funds for public education generally was sufficiently related to the unions' duties as exclusive bargaining representative to be chargeable.

The question of the chargeability of lobbying activities designed to increase funding for public education was also addressed by the District Court in a less direct context—*viz.*, in determining what proportion of the costs expended on MEA's publication, the *Teachers' Voice*, was chargeable to objectors. Reasoning that under *Ellis* "this expense [of publishing a union magazine] is chargeable to the same extent that the publication reports on activity that is chargeable," Pet. App. at 63a, the court undertook to determine how many of the column inches in the *Teachers' Voice* were devoted to reporting on chargeable activities. Having made clear that it regarded lobbying as chargeable only "to the extent that the activities are germane to the union's duties as bargaining representative," Pet. App. at 54a, the court calculated, based on an

"exhaustive[]" review of the contents of the *Teachers' Voice*, the proportion of the column inches reporting on lobbying that dealt with chargeable matters. Pet. App. at 63a, 80a. The Court of Appeals affirmed the District Court's calculation in this regard.[3]

3. *Other Political Activities Designed to Obtain Funding for Public Education*

Although the District Court found that the PPE program, discussed *supra* at 5-6, was a "lobbying" program, petitioners maintained on appeal that "the program primarily involved electoral campaigns, including the contesting of ballot issues and the passing of millages." Pet. App. at 8a. The Court of Appeals held that this contention was of no moment, because the PPE Program, whether characterized as "lobbying" or as some other form of political activity, was pursued solely to achieve measures that were "*necessary to fund public education*," Pet. App. at 9a (emphasis in original), and was therefore "directly related to collective bargaining," *id.* The court took the same approach with regard to the articles in the *Teachers' Voice* that reported on various political activities. Pet. App. at 9a-10a, 80a.

4. *Public Relations Activities Designed to Enhance the Reputation of the Teaching Profession*

The District Court determined that the articles in the *Teachers' Voice* that dealt with "public relations" were reporting on chargeable activities. Pet. App. at 80a. The Court of Appeals affirmed, noting that these articles were

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[3] In response to petitioners' contention that the District Court may have erred in its characterization of "a few particular articles" in the *Teachers' Voice*, the Court of Appeals declined petitioners' invitation "to review each and every union expenditure, no matter how minor," because the court was satisfied "that the district court correctly interpreted and applied the law to the facts of this case." Pet. App. at 10a, n.1.

"designed to enhance the reputation of the teaching profession." Pet. App. at 12a.

5. *Professional/Educational Activities Designed to Improve the Profession and the Skills of Teachers*

Certain of the articles in the *Teachers' Voice* that were found by the District Court to report on chargeable matters involved what petitioners characterize as 'nonbargaining activities related only generally to the employees' profession." Petiiton at i. The Court of Appeals affirmed the District Court on this point. It described the challenged activities as "professional/educational expenditures intended to improve the profession generally and the skills of teachers specifically," Pet. App. at 12a, and held that they were "sufficiently related to the unions' duty to represent bargaining unit employees effectively so as to be chargeable to dissenters," *id.*

6. *Conventions and Meetings*

The District Court upheld the chargeability of expenses for the MEA Representative Assembly and the NEA Convention. The court reasoned that "[b]oth are clearly chargeable to plaintiffs under *Ellis*," Pet. App. at 63a, because in *Ellis* this Court upheld the chargeability of all the costs associated with an international union convention. "By the same rationale," the District Court also approved the chargeability of FFA's expenses in "sending representatives to [a] coordinating council, where bargaining strategies and representational policies are developed for the [MEA/NEA administrative] unit composed of the Ferris State College and Central Michigan University bargaining units." Pet. App. at 58a. The Court of Appeals affirmed these rulings, concluding that the District Court had correctly applied *Ellis*. Pet. App. at 5a-6a.

7. *So-Called "Strike Preparation" Activities*

In the fall of 1981, collective bargaining between FFA and Ferris State College was not proceeding smoothly.

Although public employee strikes are unlawful in Michigan, MEA conducted a "job action investigation" in order "to determine the willingness of the local's membership to support a strike if necessary, and to put pressure on the employer by making outward preparations for a possible strike." Pet. App. at 29a. As evidence of "[t]he effectiveness of . . . [a job action investigation] as a bargaining tool," Pet. App. at 29a, the District Court cited the fact that such an investigation rarely culminates in an actual strike. *Id.* And, indeed, *no strike occurred here.* Pet. App. at 30a.

FFA made two types of expenditures in connection with the job action investigation. First, in conjunction with MEA, FFA established a "crisis center" which "serve[d] as a meeting place for the local's membership, a base from which tactical activities such as [concededly lawful] informational picketing can be conducted, and serve[d] to apply additional pressure on the employer by suggesting, whether true or not, that the local [wa]s prepared to strike if necessary." Pet. App. at 30a. Second, money was spent for "informational picketing, media exposure, signs, posters and buttons." *Id.* The purpose of these latter expenditures was explained as follows by the District Court, *id.*:

> [T]hese expenses are incurred for the purpose of informing the public of the issues involved in an attempt to bring public pressure to bear on the employer. This type of public opinion and support is very important during contract negotiations involving public sector labor unions such as the FFA given the nature of the employment and the funding available to the college.

The District Court upheld the chargeability of both types of expenditures, *id.* at 59a, stating:

> The question whether any of these expenditures may have been chargeable had a strike occurred is one that this court need not address. The "crisis center" never

became a "strike headquarters" but still served a useful purpose in the negotiations process. The rent paid to hold membership meetings was necessary to keep the employees of the bargaining unit apprised of the progress of the negotiations and to get feedback on the members' demands. Likewise, the expenditures for disbursing information to the public that was favorable to the bargaining unit's position is well within the realm of reasonable and legal bargaining tactics in the public sector labor context. Therefore, I hold that the entire [amount] expended by the FFA for these purposes is chargeable to the plaintiffs.

The Court of Appeals affirmed. It determined that the District Court's findings of fact were not clearly erroneous, and agreed with the conclusions that the court reached on the basis of those findings. Pet. App. at 11a-12a.

REASONS FOR DENYING THE WRIT

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), this Court "define[d] the line between union expenditures that all employees must help defray and those that are not sufficiently related to collective bargaining to justify their being imposed on dissenters." *Ellis*, 466 U.S. at 447. Petitioners contend that the courts below placed the seven challenged expenditures on the wrong side of the *Abood/Ellis* dividing line. Indeed, despite the fact that they were charged for only *2.75%* of NEA's expenditures and *3.4%* of MEA's expenditures, petitioners assert that "the panel majority placed no practical limits on a union's ability to force objecting nonmembers to subsidize its speech and associational activities." Petition at 9. In urging this Court to grant review, petitioners do not contend that there is any actual conflict in the circuits or among state courts as to the chargeability of any of the challenged expenditures. Instead, petitioners maintain that this case warrants review because it presents issues

of "exceptional importance," Petition at 17, as to which there is "confusion" among the courts of appeals, Petition at 21.

As we will show, petitioners' submission is bottomed on repeated distortions of what the courts below held and on a total misunderstanding of the operational relationship among affiliated unions such as FFA, MEA, and NEA. Fairly characterized, this case presents no issue warranting review.

I. THE CHARGEABILITY OF ACTIVITIES NOT CONDUCTED EXCLUSIVELY FOR PETITIONERS' OWN BARGAINING UNIT

As this Court has recognized, the duties of a collective bargaining representative frequently require "[t]he services of lawyers, expert negotiators, economists, and research staff, as well as general administrative personnel." *Abood*, 431 U.S. at 221. In order to realize economies of scale in acquiring such services, local unions generally affiliate with state and/or national organizations. *See NLRB v. Financial Institution Employees*, 475 U.S. 192, 200 n.5 (1986). In the typical affiliation arrangement, the local union makes payments to the state and/or national organizations to defray the costs of the services provided by the latter. It is settled that such affiliation payments may be charged to objecting feepayers as long as the payments are not used by the parent organizations "to subsidize activities for which nonmembers may not be charged." *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 n.18 (1986).

Petitioners attack the method by which MEA and NEA apportion their costs among local affiliates, but that attack is based on a distortion of the record and has no support in the caselaw.

A. Like virtually all state and national labor organizations, MEA and NEA do not charge their local affiliates on a pay-as-you-go basis for services rendered. Rather,

MEA and NEA function on a cost-sharing basis, *see* Pet. App. at 56a, with employees in all bargaining units charged equally for the costs of the ongoing services of the state and national organizations that are "pertinent to the unions' duties as bargaining representatives," Pet. App. at 11a. *See supra* at 4. Although petitioners contend that this system requires feepayers to pay for "activities on behalf of persons not in the employees' bargaining unit," Pet. App. at i, *see* also *id.* at 9-12, this contention misses the point of how the service fee system actually operates.

To give a concrete example, all feepayers—including those in the FFA bargaining unit—pay equally for the cost of maintaining the programs through which MEA and NEA provide assistance to local affiliates in collective bargaining. *See supra* at 4. Although FFA will not have occasion to avail itself of this assistance every year, it is not correct to state that in years when it does not require such assistance FFA is paying MEA and NEA for nothing, or that FFA is simply supporting assistance provided to other units. When MEA and/or NEA assist FFA in negotiating a collective bargaining agreement, the value of that assistance is realized not only in the year the assistance is provided, but throughout the term of the agreement. More generally, the fact that MEA/NEA support is "waiting in the wings" is of benefit to FFA throughout the collective bargaining process, even if it does not become necessary for FFA actually to call upon MEA or NEA for assistance. Accordingly, while petitioners characterize the unions' fee system as one that makes *Ferris* employees pay for services provided to *other units*, the reality, as the District Court found, is that the system is one in which employees in *all* units pay equally for services that are equally *available* to all. Petitioners' argument ignores this central feature of the unions' service fee structure.

The District Court found not only that petitioners' demand for a fluctuating pay-as-you-go fee system had

no legal basis, but that such a system would in addition be completely unworkable and would inevitably result in the unions' being unable to collect fees for services that are properly chargeable. *See supra* at 4-5. Thus, Judge Posner's observation in *Gilpin v. AFSCME*, 875 F.2d 1310, 1316 (7th Cir.), *cert. denied*, —— U.S. ——, 110 S.Ct. 278 (1989), is equally apt here: in advancing this demand "the plaintiffs and the National Right to Work Foundation are merely trying to hamstring the union."

B. Petitioners' contention that this Court imposed a requirement of a unit-by-unit breakdown in *Ellis*, *see* Petition at 9-12, is plainly wrong. Because petitioners' demand for such a breakdown relates almost exclusively to the costs of producing MEA's publication, the *Teachers' Voice*,[4] it is particularly pertinent to consider how *Ellis* dealt with publication expenditures. In *Ellis*, the defendant union charged feepayers in all bargaining units equally for the cost of producing the *international union* magazine, excepting only the portions that were devoted to nonchargeable "political causes." *See* 466 U.S. at 450. The court of appeals in *Ellis* had upheld this practice in its entirety,[5] and this Court affirmed, except as to the costs of reporting on union organizing and certain litigation. 466 U.S. at 450-51. *See infra* note 6. By excluding only articles about the latter two activities, this Court *affirmed* the chargeability of "articles [in the international union magazine] about negotiations, con-

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[4] Other than the costs of participation in meetings and conventions, which petitioners challenge on other grounds, *see infra* at 19-20, the only expenditures of MEA that were sustained as chargeable by the courts below were the costs of producing the *Teachers' Voice*. *See* Pet. App. at 62a-64a. And the amount each petitioner was required to pay for services of *NEA* was only $1.32 per year. *See* Pet. App. at 66a. Thus, as a practical matter, the "unit-by-unit" issue pertains almost exclusively to the costs of producing the *Teachers' Voice*.

[5] *See Ellis v. Railway Clerks*, 685 F.2d 1065, 1074 (9th Cir. 1982), *aff'd in part and rev'd in part*, 466 U.S. 435 (1984).

tract demands, [and] strikes" in units other than the objectors' own unit, *see* 466 U.S. at 450, and "reports on significant events for individual [units]" other than that of the objectors, *see* 685 F.2d at 1074. So too, *Ellis* affirmed the union's practice of charging objectors in all bargaining units equally for the costs of the international union's social activities, *see* 466 U.S. at 449-50, 456, and its conventions, *id.* at 448-49, 456, without regard to how much of the time spent in those activities, if any, was directed at the objectors' own bargaining unit. Thus, *Ellis* does not support petitioners' assertion that "the bargaining-unit limitation applied to publications," Petition at 12.[6]

C. Nor is there any conflict—or, to use petitioners' term, "confusion," Petition at 21—among the courts of appeals with regard to this point. Petitioners do not cite a single decision of the lower federal courts, or of any state court, that has required the unworkable unit-by-unit breakdown they urge. The fact is that every court which has considered petitioners' theory has rejected it. *See Abels v. Monroe County Education Association*, 489 N.E.2d 533 (Ind. App. 1986), *cert. denied*, 480 U.S 905 (1987); *New Prairie Classroom Teachers Assn v. Stewart*, 487 N.E.2d 1324 (Ind. App. 1986), *cert. denied*, 480 U.S. 917 (1987); *Antry v. Illinois Educational Labor Relations*

[6] Petitioners make much of the fact that *Ellis* held union organizing (and reporting about such organizing) to be nonchargeable. *See* Petition at 11. But the Court did not base this holding on the "unit-by-unit" theory urged by petitioners. Rather, the *Ellis* Court held that organizing, whether conducted within the objector's bargaining unit or outside the unit, *see* 466 U.S. at 452 & n.13, is not sufficiently related to a union's duties as exclusive representative under the Railway Labor Act to be chargeable at all, *id.* at 451-53. Nor did the Court's unique treatment of *litigation* costs announce any general requirement of a unit-by-unit breakdown of the costs and benefits of the programs provided by a national union. *See id.* at 453, 455.

Board, No 4-88-0314 (Ill. App. March 15, 1990), slip. op. at 46-50.[7]

II. THE CHARGEABILITY OF LOBBYING AND POLITICAL ACTION TO OBTAIN FUNDING FOR PUBLIC EDUCATION

The courts below allowed petitioners to be charged for the costs of the unions' lobbying on one specific subject—securing funds for public education. *See supra* at 5-6. Because without such funding there would be no way for the unions to engage in collective bargaining in any real sense, this limited category of lobbying constitutes, as the District Court put it, "the front line bargaining of [the unions'] contracts." *See supra at* 5-6.

The chargeability of such lobbying has been uniformly sustained, and this Court has repeatedly declined to review the issue. *See, e.g., Robinson v. State of New Jersey*, 741 F.2d 598, 609 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985); *Knight v. Minnesota Community College Faculty Assn.*, 571 F. Supp. 1, 6-7 (D. Minn. 1982), *aff'd mem.*, 460 U.S 1048 (1983); *Champion v. State of California*, 738 F.2d 1082 (9th Cir. 1984), *cert. denied*, 469 U.S. 1229 (1985); *Boonton Bd. of Educ. v. Kramer*, 99 N.J. 523,

[7] Petitioners assert that "[t]he majority's decision in this case as to activities outside the bargaining unit stands in stark contrast to the holding of another panel of the Sixth Circuit" in *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987), as well as the holding in *Hudson v. Chicago Teachers Local 1*, 743 F.2d 1187, 1193 (7th Cir. 1984), *aff'd on other grounds*, 475 U.S. 292 (1986). *See* Petition at 18-19. That contention is unfounded. Neither *Tierney* nor *Hudson* involved a demand for a unit-by-unit breakdown of expenditures. What is more, contrary to petitioners' contention, the general tests of chargeability articulated in those cases, quoted in the Petition at 18-19, are the same as the test the Sixth Circuit applied here. *See, e.g.*, Pet. App. at 7a (lobbying is chargeable where it is "pertinent to the duties of the union as a bargaining representative"); Pet. App. at 11a (activities not confined to petitioners' bargaining unit are chargeable if they are "pertinent to the unions' duties as bargaining representatives").

494 A.2d 279 (1985), *cert. denied*, 475 U.S. 1072 (1986); *Antry v. Illinois Educational Labor Relations Board*, *supra*, slip op. at 80-81.[8] Petitioners' suggestion that this uniform body of law conflicts with *Abood*, *see* Petition at 12-13, is plainly wrong. In *Abood*, this Court identified efforts to obtain "subsequent approval [of a written collective-bargaining agreement] by other public authorities; [and] related budgetary and appropriations decisions" as a type of lobbying that "might be seen as an integral part of the bargaining process." 431 U.S. at 236. But in offering this one example, the Court did not suggest in *Abood* that other types of lobbying related to terms and conditions of employment are not chargeable. Moreover, the limited category of lobbying at issue here, like the example offered in *Abood*, *is* "an integral part of the bargaining process."[9]

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[8] Petitioners suggest that a statement in *Beck v. Communications Workers*, 776 F.2d 1187, 1211 n.31 (4th Cir. 1985), *aff'd en banc*, 800 F.2d 1280 (4th Cir. 1986), *aff'd on other grds.*, 487 U.S. 735 (1988), may intimate a different view. But the lobbying at issue in *Beck* was " 'far remote . . . from collective bargaining, contract negotiation and grievance adjustment,' for instance, 'lobbying efforts on behalf of the adoption of the Panama Canal Treaty, and the Equal Rights Amendment.' " 776 F.2d at 1210-11 (quoting opinion of special master). Indeed, the Fourth Circuit referred with apparent approval to the special master's suggestion that lobbying on such matters as "the Telecommunications Act or Occupational Health and Safety Regulations" might be chargeable. *Id.* And petitioners concede that the statement in *Beck* is in any event *dictum*. *See* Petition at 20.

[9] Petitioners are therefore wrong in attempting to distinguish two of the cases we have cited—*Champion* and *Knight*—on the ground that those were "cases in which the 'process of establishing a written collective-bargaining agreement . . . require[d] not merely concord at the bargaining table, but subsequent approval by other public authorities' and 'related budgetary and appropriations decisions might be seen as an integral part of the bargaining process.' " Petition at 19-20, n.10, quoting *Abood*, 431 U.S. at 236. Even if *Champion* and *Knight* had involved only that kind of lobbying, they would be indistinguishable in principle from this case, which, as we have shown, involves lobbying that is part and parcel of the bargaining process. But in point of fact, the lobbying held to be chargeable in *Champion* included all "lobbying activities designed to foster policy goals and collective negotiations and contract administration, or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employer." 738 F.2d at 1083, 1086. In *Knight* as well, it is clear that the lobbying the court characterized as "relat[ing] directly to collective bargaining," 571 F. Supp. at 7, included at least the kinds of lobbying at issue here. *See Knight v. Minnesota Community College Faculty Assn.*, 111 L.R.R.M. 3156, 3162-63 (D. Minn. 1982) (findings of fact).

The same is true with respect to the other forms of political action at issue. Although petitioners state broadly that this case involves the chargeability of activities in the realm of "electoral politics, including campaigns concerning ballot issues," Petition at i, *see also id. at* 5, 12-14, the only activities that were held to be chargeable were campaigns to raise funds for public education, such as the contesting of ballot issues on that subject and the passing of millages. *See* Pet. App. at 8a-9a. Thus, the foregoing discussion of lobbying is equally applicable to the issue of "electoral politics" petitioners seek to raise.

Nor is there any merit to petitioners' contention that this Court has declared school funding to be a matter of public concern that affects teachers' employment "only tangentially and insubstantially," and that nonmembers therefore cannot be required to support the unions' activities relating to it. *See* Petition at 13-14 & n.6, citing *Pickering v. Board of Education*, 391 U.S. 563 (1968). In *Pickering* the Court merely observed that the objection a teacher had voiced to a school district's allocation of funds—namely, that the school district was spending too much on athletics—was an expression of that particular individual's concern as a citizen rather than as an employee. *See id.* at 569, 571, 574. The Court did not suggest that issues as to the allocation of funds for education, or as to the level of funding of education generally, do not

significantly affect teachers' employment. Obviously, they do. *See generally Abood*, 431 U.S. at 228.

To be sure, questions about school funding, while they directly affect teachers' employment, are also matters of public concern. But *Abood* squarely rejects the notion that a feepayer has a constitutional right to refuse to pay his or her fair share of the costs of union activities that are otherwise chargeable, simply because those activities involve a matter of public concern as to which the feepayer has a different view than the union. *See* 431 U.S. at 222, 230. As the Court recognized, collective bargaining in the public sector almost always involves such matters, *id.*, and if there were a "public concern" exception to chargeability, the public sector agency fee, upheld in *Abood*, would be of no practical significance.

In sum, on the question of lobbying and other political action designed to obtain funding for public education, the decision below does not conflict with any decision of this Court or of any other court, and does not merit further review.

III. THE CHARGEABILITY OF PUBLIC RELATIONS ACTIVITIES DESIGNED TO ENHANCE THE REPUTATION OF THE TEACHING PROFESSION, AND PROFESSIONAL/EDUCATIONAL EXPENDITURES DESIGNED TO IMPROVE THE PROFESSION AND THE SKILLS OF TEACHERS

Turning to what they describe as the unions' "public relations activities" and "non-bargaining activities related only generally to the employees' profession," Petition at i, petitioners assert that the Court of Appeals approved the chargeability of these items only "because it viewed the expenditures as *de minimis*." *Id.* at 14. Once again, however, petitioners fail to provide the full picture. The "public relations" activities in question consist solely of articles in the *Teachers' Voice* "designed to enhance the

reputation of the teaching profession," Pet. App. at 12a; and the "non-bargaining activities" consist solely of "professional/educational expeditures intended to improve the profession generally and the skills of teachers specifically," *id.* Given these findings, the Court of Appeals concluded that these activities, like the social activities held to be chargeable in *Ellis*, are "sufficiently related to [collective bargaining]" to be chargeable, Pet. App. at 12a, quoting *Ellis*, 466 U.S. at 449, and that *because of this relationship* no further scrutiny of these *de minimis* expenditures was necessary, *see* Pet. App. at 12a, citing *Ellis*, 466 U.S. at 450.[10]

It is therefore completely consistent with this Court's decisions to charge petitioners for the kinds of public relations and professional/educational activities involved here. Nor do petitioners assert that any lower court decision is to the contrary, and we are aware of none. The issue does not merit review.[11]

IV. THE CHARGEABILITY OF CONVENTIONS AND MEETINGS

The courts below upheld the chargeability of the costs of sending FFA delegates to the NEA Convention, the MEA Convention (known as the Representative Assem-

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[10] Petitioners' contention that these activities have a higher degree of First Amendment content that the social activities involved in *Ellis*, see Petition at 14, does not call for a different result. *Abood* acknowledges that a constitutionally permissible agency fee arrangement necessarily implicates important First Amendment interests, *see* 431 U.S. at 222, 230; and in *Ellis* the Court approved the chargeability of activities that "have direct communicative content and involve the expression of ideas," 466 U.S. at 456.

[11] Petitioners state cryptically that "the panel majority allowed the nonmembers to be charged for certain political and ideological activities that were completely unrelated to bargaining." Petition at 14. As indicated by petitioners' citation to the Appendix at 10a n.1, this contention is simply an overblown reference to the point discussed in note 3, *supra*, which obviously does not merit review by this Court.

bly), and the "13E Coordinating Council," which is a forum "where bargaining strategies and representational policies are developed for . . . the Ferris State College and Central Michigan University bargaining units." Pet. App. at 5a-6a, 58a, 62a-63a. Although petitioners attempted to distinguish these meetings from the international union convention that was held to be chargeable in *Ellis*, 466 U.S. at 448-49, 456, the Court of Appeals correctly found the proffered distinctions unpersuasive.

The court noted that the convention in *Ellis*, like the meetings and conventions here, involved political elements, and that this Court nevertheless held the entire convention to be chargeable. Pet. App. at 6a. The Sixth Circuit also dismissed as simply "a technical difference in union organization," Pet. App. at 6a, petitioners' contention that MEA and NEA, unlike the international union in *Ellis*, are mere "affiliates" of the bargaining representative, FFA. The court noted that this contention was in any event foreclosed by the District Court's finding that FFA "*as affiliated* is the exclusive representative." *Id.* (emphasis added). Because petitioners as much as admit that they merely seek to reargue the facts on these points, *see* Petition at 11, n.5, certiorari is not warranted.

V. THE CHARGEABILITY OF THE SO-CALLED "STRIKE PREPARATION" ACTIVITIES

Petitioners assert that "strike preparation" activities cannot be chargeable where public employee strikes are illegal, even when, as here, no strike takes place, because "[t]he state's only interest in this context is in preventing such subsidization, not in sanctioning it and thus encouraging the illegal activity." Petition at 16. This issue does not merit this Court's attention for several reasons. To begin with, the issue is *sui generis*, and petitioners do not cite a single case other than this one in which it has arisen. What is more, the issue petitioners seek to raise—*i.e.*, whether objecting feepayers can be charged for

expenditures for violating state law or for planning unlawful activity—is not actually presented by this case.

Although Michigan has declared that public school teacher strikes are illegal, the State has not declared that it is unlawful, or even contrary to public policy, for a union to threaten such a strike. Nor has there been any finding that to allow such speech "encourag[es] the illegal activity," as petitioners assert. To the contrary, the findings of the District Court in this case, affirmed by the Court of Appeals, are that the actions in which the unions engaged were not likely to result in an illegal strike. Pet. App. at 29a, 11a. For all that appears, allowing a union to threaten a strike, thereby placing pressure on the employer in a way that may help to bring about an agreement, may make a strike *less* likely than if the union were required to refrain from exerting such pressure. Thus, this case presents no findings or evidence from which it could be concluded that respondents' actions were contrary to state law, or that those actions "encourag[ed] . . . illegal activity." Petition at 16.

Finally, even accepting petitioners' assertion that the unions' activities included "planning unlawful acts" (acts which, we reiterate, did not actually occur), *see* Petition at 16, and assuming further that such activities are *ipso facto* nonchargeable even where they are pursued on behalf of the bargaining unit in connection with collective bargaining, the issue petitioners seek to raise still is not properly before this Court. The District Court specifically found that all of the money spent by the unions on so-called "strike preparation activities" served to promote other plainly chargeable purposes that were beyond reproach. *See* Pet. App. at 30a, 59a, quoted *supra* at 9-10. To put it simply, no money was spent solely to "plan unlawful acts": the money in question would have been spent even if the unions' public statements had been confined to explaining the unions' position on the issues and had not also included a threat of a strike.

The District Court emphasized these distinguishing features in approving the chargeability of the particular FFA expenditures at issue. Indeed, the court refused to approve the chargeability of *NEA's* expenditures for "job actions," stating that "whether certain expenditures for job actions are to be considered chargeable is a determination to be made on the basis of the particular fact situations," and that the facts surrounding the NEA expenditures had not been sufficiently developed. Pet. App. at 65a.

Thus, the question whether a union may charge objecting feepayers for expenditures devoted to "threatening and preparing for" unlawful activity, Petition at i, is not presented by this case.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

JAMES P. LEHNERT, *et al.*,
Petitioners,

v.

THE FERRIS FACULTY ASSOCIATION-MEA-NEA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

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I. THE UNIONS REWRITE *ELLIS* AND IGNORE CONFLICTING VIEWS ON THE UNIT ISSUE

Respondents' Brief in Opposition ("Opposition") is more significant for what it omits than what it says. Its restatement of the Questions Presented describes the test for chargeable costs under *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), as whether expenses "were 'normally or reasonably employed to implement or effectuate the duties of' the exclusive representative." Opposition at i. If *Ellis*, 466 U.S. at 448 (emphasis added), is quoted in full, which respondent unions never do, the standard is far narrower:

> the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative *of the employees in dealing with the employer on labor-management issues*. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering *a* collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative *of the employees in the bargaining unit*.

Accord Austin v. Michigan State Chamber of Commerce, 58 U.S.L.W. 4371, 4375 (U.S. Mar. 27, 1990) (No. 88-1569).

Two other omissions show that petitioners are not "plainly wrong" in reading that test as requiring "a unit-by-unit breakdown," as the Opposition at 13 says. The unions never mention the dissenting opinion of Circuit Judge Merritt, who agreed that *Ellis* "establishes the principle that the union expenses charged * * * must relate closely to the activities of the bargaining unit of the

dissenting members." App. A at 15a.[1] And the unions ignore *Crawford v. Air Line Pilots*, 870 F.2d 155 (4th Cir. 1989) (argued en banc Oct. 3, 1989), although it supports them on the unit issue. That omission is revealing because, like Judge Merritt's opinion, the grant of rehearing in *Crawford* demonstrates that the issue is an important one on which there are divergent views in the lower courts.

The unions also rewrite the rulings of *Ellis* on specific activities. They say that it affirmed that costs of all portions of the union's magazine devoted to non-political subjects, including activities in other units, can be charged to dissenters, except those reporting on organizing and certain litigation. Opposition at 13-14. *Ellis*, 466 U.S. at 451, *actually* held that, "[i]f the union cannot spend dissenters' funds for a particular activity, it has no justification for spending their funds for writing about that activity." Organizing and litigation not involving the dissenters' bargaining unit were simply examples of nonchargeable activities, *id.* at 451 n.11, which include *all* activities excluded by the general test.[2]

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[1]A critic of *Ellis* concurs that its formula "inquires whether a particular expenditure was authorized by a policy * * * of requiring nonmember employee support only for specific collective bargaining services rendered on behalf of the payor or her unit." Friesen, *The Costs of "Fee Speech"—Restrictions on the Use of Union Dues to Fund New Organizing*, 15 Hastings Const. L.Q. 603, 624 (1988); *see also The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 70, 196-98 (1977) (same limit required by *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), and *Machinists v. Street*, 367 U.S. 740 (1961)).

[2]The topics listed by *Ellis*, 466 U.S. at 450, were not necessarily held chargeable, as the Opposition at 13-14 implies. They include articles about "proposed or recently enacted legislation," which were not chargeable under the union's rebate policy, *Ellis v. Railway Clerks*, 685 F.2d 1065, 1069 (9th Cir. 1982), *aff'd in part, rev'd in part*, 466 U.S. 435 (1984). The Court *adopted* that limit. 466 U.S. at 450-51.

Similarly, the rulings in *Ellis* as to social activities and conventions do not support the unions' contention that activities which have no direct relationship to statutory representation of the nonmembers' bargaining unit may be charged to them, so long as some employment-related interest of employees or former employees is affected somewhere, even where there is no public-sector bargaining. As is typical in the railway and airline industries, but not true here, in *Ellis* the national union was itself the exclusive representative. *Compare* Brief for Respondents at 27, *Ellis* (No. 82-1150), *and Crawford*, 870 F.2d at 157, *with* App. A at 2a. Thus, the social activities and conventions in *Ellis*, 446 U.S. at 448-50, were directly related to representation of more than one unit, including the objectors'. In this case, the charges at issue are not costs of bargaining-related services provided to more than one unit, chargeable proportionally to dissenters in all of those units, but charges for services provided *only* to other units.

II. THE UNIONS IGNORE THE SERIOUS FIRST-AMENDMENT IMPLICATIONS OF THIS CASE

Most striking in the unions' brief is the silence as to how the decision below meets first-amendment scrutiny. Indeed, the first amendment appears only in a footnote. First-amendment concerns are deprecated as irrelevant, because "*Abood* [*v. Detroit Board of Education*, 431 U.S. 209 (1977),] acknowledges that a constitutionally permissible agency fee arrangement necessarily implicates important First Amendment interests," and *Ellis* "approved the chargeability of activities that 'have direct communicative content and involve the expression of ideas.'" Opposition at 19 n.10 (quoting *Ellis*, 466 U.S. at 456). Yet *Abood* and *Ellis* do not hold first-amendment analysis unnecessary. To the contrary, *Abood* established that strict scrutiny is required in determining chargeability, and *Ellis* applied it.

The part of *Abood* the unions cite held the agency shop constitutional only insofar as a bargaining agent carries out its duties of "negotiating and administering a collective-bargaining agreement" and adjusting grievances "within the relevant unit." 431 U.S. at 221-22, 232. But when service fees are spent to advance political or ideological causes in other fora, the relevant principles are those applied in the first-amendment cases relied on in the *next* part of *Abood*, 431 U.S. at 232-36, such as *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976), and *Buckley v. Valeo*, 424 U.S. 1, 25, 64-65 (1976). The most basic such principle is strict scrutiny. *See Teachers Local 1 v. Hudson*, 475 U.S. 292, 302-03 & nn.11-12 (1986).

Ellis, 466 U.S. at 456, implicitly applied strict scrutiny to all disputed activities which "have direct communicative content and involve the expression of ideas": conventions, publications, organizing, and litigation. The conventions and portions of publications held chargeable met the stricter part of the *Ellis* test, that to be chargeable costs must be "necessarily * * * incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues," *id.* at 448. The Court found that conventions "such as those at issue here are * * * *essential* to the union's discharge of its duties as bargaining agent"; and, that the "union *must* have a channel for communicating with the employees" about "those activities it can charge them for doing." *Id.* at 448-51 (emphasis added).

The Ninth Circuit had ruled that organizing and all litigation met the less exacting part of the *Ellis* test, *i.e.*, are "reasonably incurred for the purpose of performing" statutory duties in the objectors' bargaining unit, since they "strengthened the union as a whole" and "ultimately benefited * * * collective-bargaining efforts" in the unit. *Id.* at 441, 448. Nonetheless, because organizing and litigation

outside the unit are not "necessarily * * * incurred" for bargaining in it, this Court held them not chargeable. *Id.* at 451-53. The *only* activity found chargeable on the ground that it met the broader "reasonably incurred" test was social activities, which have no inherent communicative content. *Id.* at 449-50, 456.

All activities at issue here, even as the unions mischaracterize them, have significant "direct communicative content and involve the expression of ideas," *id.* at 456. Thus, those activities are not chargeable unless *necessary* to bargaining in the nonmembers' unit. Indeed, lobbying and ballot proposition campaigns are "at the heart of the First Amendment's protection." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978); *see Meyer v. Grant*, 108 S. Ct. 1886, 1895 (1988). So too are many of the public relations and other "general expenses" at issue, because, as Judge Merritt pointed out, they "are connected with political positions and philosophies with which the dissenters disagree." App. A at 15a-16a (dissenting).

To avoid first-amendment analysis of the bargaining-unit issue, the unions treat it as a discrete question. It is not. As Judge Merritt recognized, the *only* expenses at issue "which directly relate to the Ferris College bargaining unit's activities are the costs of preparing for a public employee strike which * * * would have been illegal if carried out." *Id.* at 16a. Thus, the issue is not just the chargeability of bargaining activities in other units, but also whether nonmembers must subsidize lobbying, ballot campaigns, and other ideological activities that involve their unit only indirectly or not at all.[3]

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[3]Like the majority below, the unions never claim that the "funding for public education" for which they lobbied and campaigned was for higher education in general, much less for Ferris State College. *See* Petition at 14 n.6.

Moreover, strict scrutiny applies even to bargaining-related activities in other units held chargeable below. They include litigation, *in direct conflict* with *Ellis*, 466 U.S. at 453. App. B at 55a-57a, 80a.[4] Even non-unit bargaining is petitioning of government on subjects other than *the objectors'* terms and conditions of employment.

III. THIS IS THE FIRST CASE TO REACH THE COURT WITH THE RECORD NEEDED TO ANSWER THE QUESTIONS POSED IN *ABOOD*

The unions argue against certiorari on the important question of the chargeability of lobbying and political action, because the Court denied plenary review in *Robinson v. New Jersey*, 741 F.2d 598 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985), *Knight v. Minnesota Community College Faculty Ass'n*, 571 F. Supp. 1 (D. Minn. 1982) (3-judge court), *aff'd mem.*, 460 U.S. 1048 (1983), *Champion v. California*, 738 F.2d 1082 (9th Cir. 1984), *cert. denied*, 469 U.S. 1229 (1985), and *In re Boonton Bd. of Educ. (Kramer)*, 99 N.J. 523, 494 A.2d 279 (1985), *cert. denied*, 475 U.S. 1072 (1986). However, that issue was not involved in *Knight, see* 571 F. Supp. at 6, and was not presented in the other cases in the same posture as here.

Whether activities "properly fall under the definition of collective bargaining" are "difficult constitutional questions" under the first amendment which can only be decided with concrete evidence of their precise nature. *Abood*, 431 U.S. at 236-37. The record was insufficiently

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[4] The district court speculated that it would be unduly burdensome to account for litigation and other direct expenses by unit. App. B at 57a. The testimony belies that speculation. Litigation expenses *were already kept by unit*, without burden. JA at 155, 174-77. And, the NEA's accounting manager admitted that field personnel could designate the units served on the timesheets indicating daily activities kept by all of its employees. JA at 183-87.

developed in *Robinson*, *Champion*, and *Kramer*. The only evidence in *Robinson* as to lobbying, which the district court held nonchargeable on motions for preliminary injunctions, was in affidavit form. *See Robinson v. New Jersey*, 547 F. Supp. 1297, 1301-02, 1313, 1316-17 (1982), *further proceedings sub nom. Olsen v. Communications Workers*, 559 F. Supp. 754, 769-70, *further proceedings sub nom. Robinson v. New Jersey*, 565 F. Supp. 942, 944 (D.N.J. 1983), *rev'd*, 741 F.2d 598 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985). The record also was limited in *Champion*, which was decided on appeal from denial of a preliminary injunction. *See* 738 F.2d at 1085-86. There was no record of expenses at all in *Kramer*, because determination of the activities on which nonmembers' fees could be spent was outside the jurisdiction of the agency in which the case was filed. *See* 99 N.J. at 536 & n.1, 494 A.2d at 285-86 & n.1. Here, in contrast, a comprehensive record as to lobbying and political action was developed at trial through the testimony of several witnesses and many exhibits. *See* App. B at 19a, 30a-33a, 39a-43a.

Distorting the record by selective quotation from the opinions below, the unions assert that lobbying and other political action were held chargeable only "on one specific subject—securing funds for public education." Opposition at 15, 17. On first-amendment issues, this Court does not defer to findings of lower courts, but examines the entire record anew. *Rankin v. McPherson*, 483 U.S. 378, 384-86 & n.9 (1987); *see Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 173-76 & n.5 (1976) (independently determining what properly constitutes "negotiating"). Here, the lobbying concerned not just appropriations for public education, but, *inter alia*,

taxes,[5] statutory retirement benefits, proposed abolition of the U.S. Department of Education, and tuition tax credits. *See* Exs. 594 at 9-17 (JA 159, 528-36), 612 (JA 163, 165, 663), GGGG at 40-41 (JA 366, 654-55). Similarly, the other political action held chargeable was not just "campaigns to raise funds for public education," Opposition at 17. It also was efforts "on ballot propositions involving utility rates and a nuclear weapons freeze," as the panel majority conceded, App. A at 10a, and "in state and local elections on behalf of candidates," as Judge Merritt recognized, *id.* at 13a (dissenting). *See, e.g.*, Exs. 162 (JA 301, 448), 164 (JA 326, 450), 167 (JA 304-05, 463), 168 (JA 330, 471), 170 (JA 305-06, 479), 594 at 18-23 (JA 159, 537-42), 612 (JA 163, 165, 663).

Moreover, in denying conflict between the majority's holding that the lobbying and other political action at issue is "directly related" to bargaining, App. A at 7a-9a, and *Pickering v. Board of Education*, 391 U.S. 563 (1968), the unions show it. They distinguish *Pickering*, because the public statements there concerned "a school district's allocation of funds," while the lobbying and political action here concerned "the allocation of funds for education" or the "level of funding of education generally." Opposition at 17-18.[6] However, the legislature's allocation of funds among educational purposes, or between education and other governmental functions, is *more* remote from employer-employee relations than the immediate employ-

[5] Taxation is not a "budgetary [or] appropriations" decision that "might be seen as an integral part of the bargaining process," *Abood*, 431 U.S. at 236 (*dicta*). Like the election of "pro-labor political candidates," *Ellis*, 466 U.S. at 453, who make those decisions, taxation relates only indirectly and contingently to bargaining.

[6] In fact, the statements in *Pickering* also concerned the district's overall level of funding. *See* 391 U.S. at 565-66.

er's allocation of funds within a particular bargaining unit. Thus, the holding of *Pickering*, 391 U.S. at 571-74, that the speech there was insufficiently related to employment to be a matter of employer-employee relations, rather than "debate on matters of public importance" fully protected by the first amendment, applies *more strongly* here.

IV. THE ISSUE OF STRIKE PREPARATIONS IS NOT *SUI GENERIS* AND IS PRESENTED HERE

The unions make two disingenuous arguments against review of the chargeability of the local union's costs "in publicizing, preparing for and threatening a strike that would be illegal under Michigan law." App. A at 11a.

First, they say "the issue is *sui generis*." Opposition at 20. That no other reported decision has addressed the problem yet does not make it unique. Agency-shop agreements exist in hundreds of bargaining units represented by the unions' affiliates in Michigan. *See* Ex. 73 at 3-4 (JA 439-40, Culver Tr. 108-09). At least thirteen locals conducted strikes in the year at issue. *See* Ex. 612, Oct. 26, 1981, at 12 (JA 163, 165, 710). A strike actually occurs in "only one out of every seven or eight" situations in which a local makes "outward preparations for a possible strike," App. B at 29a, which means that nonmembers' fees probably were used to threaten illegal strikes in almost 100 instances that year. Moreover, the misuse of compulsory fees for that purpose undoubtedly is not limited to Michigan. At least seventeen other states, including two in the Sixth Circuit, and the District of Columbia authorize agency shops, but prohibit strikes, for public employees.[7]

[7] *See, e.g.*, Ky. Rev. Stat. Ann. §§ 345.050(1)(c), .130 (Michie 1983) (firemen); N.Y. Civ. Serv. Law §§ 208, subd. 3, 210 (McKinney 1983 & Supp. 1990) (all public employees); Ohio Rev. Code Ann. §§ 4117.09(C), .11(B)(5), .14(D) (Baldwin 1983) (essential employees).

Second, the unions deny that the issue is presented, because they claim that the disputed money was not spent solely to threaten or prepare for a strike. Opposition at 21-22. However, the only other purposes the expenditures served were providing a meeting place for members during negotiations and "informing the public of the issues involved in an attempt to bring public pressure to bear on the employer." App. B at 30a. Those purposes were not "plainly chargeable" and "beyond reproach," as the Opposition at 21 asserts. A temporary *strike* headquarters was not needed to hold union meetings; and, public pressure was not significant to the negotiations, because Ferris does not derive funds from the local community, but from tuition and legislative appropriations, *see* JA at 287-88, 290; Ex. 29 at 10 (JA 353, 426). Even assuming that a strike was not intended,[8] the only real purpose for the "crisis center" and public information activities was to make the threat of a strike credible. Moreover, even where strikes are legal, creating a favorable climate of public sympathy and support for the union is "not 'reasonably necessary . . . for the proper effectuation' of collective bargaining." *Beck v. Communications Workers*, 776 F.2d 1187, 1211 n.32 (1985), *aff'd en banc*, 800 F.2d 1280 (4th Cir. 1986), *aff'd on other grounds*, 487 U.S. 735 (1988).

V. CONCLUSION

The petition should be granted as to all questions.

Respectfully submitted,

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[8] That assumption is contrary to the documentary evidence. *See* Exs. 29 (JA 353, 419), 33 (JA 413, 415, 429), 627 (JA 385, 601).

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No. 89-1217

IN THE

Supreme Court of the United States

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JAMES P. LEHNERT, *et alia*,

Petitioners,

v.

THE FERRIS FACULTY ASSOCIATION-MEA-NEA, *et alia*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE PUBLIC SERVICE RESEARCH COUNCIL, IN SUPPORT OF PETITIONERS

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BRIEF *AMICUS CURIAE* OF THE PUBLIC SERVICE RESEARCH COUNCIL, IN SUPPORT OF PETITIONERS

INTRODUCTION

Pursuant to Rule 37.2 of the Rules of this Court, the Public Service Research Council submits this brief *amicus curiae*, in support of petitioners. Both petitioners and respondents have consented to the filing of this brief.

INTEREST OF THE *AMICUS CURIAE*

The Public Service Research Council is this nation's largest independent, nonprofit citizens' organization

concerned with public-sector unionism and the influence of public-sector unions on governmental institutions, policies, and operations. The Council widely distributes the results of its research and studies on public-sector unionism to the general public, newspapers, radio and television stations, the Congress, various governmental units throughout the United States, and other interested persons. The Council also engages in wide-ranging public education, legislative action, assistance to local citizens' groups, and legal challenges to the abuses of public-sector unionism.

More specifically, the Council has participated as *amicus curiae* in numerous cases before this Court, including *City of Madison, Joint School District No. 8* v. *WERC*, No. 75-946 (October Term, 1975); *Perry Education Association* v. *Perry Local Educators' Association*, No. 81-896 (October Term 1981); *Bureau of Alcohol, Tobacco and Firearms* v. *Federal Labor Relations Authority*, No. 82-799 (October Term, 1982); and *Champion* v. *Deukmejian*, No. 84-1010 (October Term, 1984).

The Council is concerned with the instant case because, unless overruled here, the decision of the majority of the Court of Appeals will extend the power of public-sector unions acting as the statutory "exclusive representatives" of nonunion employees far beyond the merely *economic* realm of collective bargaining over the terms and conditions of those individuals' employment, by licensing such unions to compel nonunion employees to subsidize both

* union activism in the purely *political* arenas of legislation and electoral campaigns; and
* strikes and potentially myriad other union activities unquestionably *illegal* under State law.

In as much as petitioners have naturally focussed on the numerous and particular *details* of the case as to Ferris State College raised in the "Questions Presented" in their petition, they have not sufficiently emphasized the erroneous *conception* of exclusive representation adopted by the Court of Appeals' majority, and the grave significance that the majority's error (if generally followed) will have throughout public-sector employment nationwide. In its brief, the Council hopes to provide this Court with such a broad perspective on what the majority of the Court of Appeals has done, so as to render pellucidly clear the pressing need for issuance of a writ of certiorari here.

SUMMARY OF THE ARGUMENT

By licensing unions acting as the exclusive representatives of nonunion employees to collect "agency fees" from those employees *both* for otherwise lawful political and ideological activities that are nevertheless *not "integral"* to the process of statutory collective bargaining *and* for plainly *illegal* activities that are outside of that process by definition, the majority-decision of the Court of Appeals has, in effect, attempted to reverse the central holdings of *Abood* v. *Detroit Board of Education*[1] and *Ellis* v. *Railway Clerks*.[2] Absent this Court's intervention by writ of certiorari, the majority's decision will foster confusion, if not chaos, in the evolving jurisprudence of public-sector "agency-fee" arrangements.

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[1] 431 U.S. 209 (1977).

[2] 466 U.S. 435 (1984).

ARGUMENT

I. The Court of Appeals' majority has improperly extended the authority of unions acting as the exclusive representatives of nonunion public employees beyond the circumscribed *economic* realm of statutory collective bargaining into the potentially limitless *political* arena of legislative lobbying and electoral campaigns.

In *Abood*,[3] this Court upheld the constitutionality of the particular Michigan *public*-sector "agency-shop" scheme at issue here on the authority of two *private*-sector decisions, *Hanson*[4] and *Street*,[5] and *only* "insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes".[6] This reliance on *private*-sector cases, restriction of the exclusive representative's authority to the narrowly defined field of "collective bargaining", and refusal to find that "a public employee has a weightier First Amendment interest than a private employee in not being compelled to contribute to the costs of exclusive union representation"[7] all demonstrate that *Abood* understood public-sector exclusive representation as no less essentially *economic* in character than its private-sector counterpart—at least with respect to the forced "agency"-

[3] *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

[4] *Railway Employes' Department* v. *Hanson*, 351 U.S. 225 (1956).

[5] *Machinists* v. *Street*, 367 U.S. 740 (1961).

[6] Abood, 431 U.S. at 232.

[7] *Id.* at 229.

relationship between the union and such nonunion employees as petitioners here.[8]

Moreover, *Abood* specifically held that the First Amendment absolutely precludes an exclusive representative "from requiring any [nonunion employee] to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher", insofar as those "ideological activities [are] unrelated to collective bargaining".[9] Thus, *Abood* clearly established that the authority of an exclusive representative *vis-a-vis* nonunion public-sector employees is not essentially, primarily, or even generally but only *contingently and incidentally* political and ideological: namely, to the limited extent that the union's "ideological activities" are "germane to its [statutory] duties as collective-bargaining representative".[10]

Abood did recognize in *dicta* that

> [t]he process of establishing a written collective-bargaining agreement prescribing the terms and

[8] *See id.* at 230: "The very real differences between exclusive-agency collective bargaining in the public and private sectors are not such as to work any greater infringement upon the First Amendment interests of public employees" than of private employees.

[9] *Compare id.* at 235-36 (opinion of Stewart, J.) *with id.* at 254 (opinion of Powell, J.),

[10] *Id.* at 235 (footnote omitted). *Abood's* discriminating use of the adjective "germane" highlights the teaching that an exclusive representative's authority to compel nonunion employees to subsidize its "ideological" activities through "agency-shop" fees derives from the "close relationship" of those activities to its statutory duties. *See Black's Law Dictionary* (rev. 4th ed. 1968), at 816.

> conditions of employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process[11]

—thereby leaving a small and largely theoretical scope for union "lobbying" that would be permissibly chargeable to nonunion employees, *not* because the union has a protean roving commission to posture as their general *political* "agent" in its capacity as exclusive representative, but because the "lobbying" is in fact and law "integral" to the fundamentally *economic* process of *fixing* and *implementing* specific terms and conditions of employment for those employees.[12]

The decision of the majority of the Court of Appeals eviscerates the careful limitations *Abood* prescribed and, in an operation worthy of Dr. Frankenstein, transmogrifies a union acting as the exclusive representative of nonunion employees from an *economic* "agent" that may engage solely in "ideological" activities functionally "integral" to the performance of its economic tasks into a *political* "guardian" that may run amok in legislative lobbying and electoral campaigns wholly distinct from the process of collective bargaining itself. This result is reflected most repellingly in the majority's rationalization that

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[11] 431 U.S. at 236.

[12] Again, the *Abood* Court's use of the adjective "integral" is significant in teaching that any political and ideological activity claimed as chargeable would have to be "necessary to make a whole" of the collective-bargaining process. *See Webster's New Twentieth Century Dictionary* (2d ed. unabrgd. 1970), at 953.

> [i]t cannot be disputed that governmental budget and appropriations decisions directly affect the terms and conditions of employment for public employees. To represent their members effectively, public sector unions must necessarily concern themselves not only with negotiations at the bargaining table but also with advancing their members' interests in legislative and other "political" arenas.[13]

Nothing in this apology supports the majority's conclusion.

First, that some, or perhaps even all, "governmental budget and appropriations decisions" may "directly affect the terms and conditions of employment of public employees" begs the question—which is, "Are those decisions 'an integral part of the bargaining process', in the sense of being necessary for the implementation of a particular collective-bargaining agreement?" Obviously, the amount *A* that a governmental unit may be allocated to fund a negotiated employment-agreement depends to some, and perhaps even to a large, degree on the amounts *B*, *C*, *D*, . . ., *Z* that may be required to fund all other governmental programs—which amounts, in turn, depend on the overall availability of funds through taxation or borrowing, the priorities for allocation of those funds, and numerous other controversial issues of public policy. According to what the Court of Appeals' majority claims "cannot be disputed", the union's statutory authorization to negotiate the amount *A* empowers it to compel nonunion employees to subsidize its legislative activism with respect to *every other govern-*

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[13] 881 F.2d at 1392.

mental expenditure that could possibly compete with A, with respect to *every means by which the government could raise revenue that might be allocated to* A, and with respect to *the prioritization of every governmental program that might require the expenditure of funds*: in short, to lobby on almost anything and everything!

Second, the Court of Appeals' majority itself admits that, in such lobbying, the "unions [are] necessarily concern[ing] themselves *not only with negotiations at the bargaining table*"—that is, the unions' activism is *not* "an integral part of the bargaining process" at all. The majority's gratuitous assumption is that the status of exclusive representative broadly licenses a union to "advanc[e its] members' interests" through whatever means it deems necessary: The legitimacy of the means is to be tested by whether implementation of that means can advance the "members' interests". The correct analysis under *Abood*, however, gauges the propriety of any means the union desires to employ by that means' "integral" relationship *vel non* to the statutorily defined process of collective bargaining, irrespective of the efficacy of that process in achieving all of the "members' interests".[14]

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[14] The Court of Appeals' facile reference to "*members*' interests" is misleading, in as much as this case involves the interests of *non*members of the union who are largely antagonistic to the organization's goals. Moreover, the assumption that the union's hierarchy actually represents the *political* interests of even the organization's voluntary members is highly questionable. *E.g.*, *Federal Election Comm'n* v. *National Education Ass'n*, 457 F. Supp. 1102, 1108 (D.D.C. 1978):

> The NEA suggests that because their members voluntarily choose to join, it is likely they also would choose to contribute to its political activities.
>
> Although this argument has some merit, it is not without its weaknesses. First of all, coincidence of viewpoints between a member and a labor organization's employment objectives does not necessarily translate into coincidence of political viewpoints. Secondly, when a member joins, he likely assumes that he will have to pay his fair share of the cost of the union's normal labor activities. It does not follow that he knows he will also be supporting the union's extracurricular activities in the political arena unless he expressly objects.

Third, the Court of Appeals' majority's license for unions to compel the payment of "agency fees" for use in "legislative and other 'political' arenas" is limitless. Already, the majority has broadly approved lobbying the legislature *and* "electoral campaigns, including the contesting of ballot issues and the passing of millages".[15] According to its reasoning, union intervention in the internal affairs of political parties, participation at political conventions, and support for political candidates for public office should also (and especially) be chargeable to nonunion employees, in as much as lobbying unsympathetic legislators is no way for sensible unions "[t]o represent their members effectively".

In sum, if the Court of Appeals' majority-decision stands, at least in the Sixth Circuit public-sector exclusive representatives will hereafter be suffered to impose themselves on nonunion employees, not only as those employees' economic "agents" for the narrow purposes of statutory collective bargaining, but also as the employees' *political controllers* with respect to every issue of public policy that could conceivably "affect [their] terms and conditions of employment". This is neither the arrangement *Abood*

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[15] 881 F.2d at 1392.

countenanced nor one in which this Court could ever acquiesce, if the First Amendment really does protect individual self-determination in the realm of political opinion.[16] And for this reason alone, a writ of certiorari should be issued.

II. The Court of Appeals' majority has wildly licensed unions acting as the exclusive representatives of nonunion public employees to compel those employees to subsidize the unions' *illegal* activities.

In *Ellis*, this Court defined "the test" for a permissible "agency fee" as

> whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the [statutory] duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.[17]

Self-evidently, an activity *illegal* under State law cannot conceivably be within the statutory "duties of an exclusive representative", and therefore cannot conceivably give rise to an expense chargeable under an "agency-fee" scheme. Indeed, if inherent in the performance of "the duties of an exclusive representative" is the representative's compliance with all laws that define its proper ambit of operations, engaging in *illegal* activity necessarily amounts to the very *opposite* of "performing th[ose] duties".

Not to the Court of Appeals' majority, however, which deemed "union expenditures made for publicizing, preparing for and threatening a strike that

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[16] *See West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 630-31 (1943).

[17] 466 U.S. at 448.

would be *illegal* under Michigan law" to be "within the range of *reasonable* bargaining tools available to a public sector union"![18] The absurdity of this equation of lawlessness with reasonableness is self-evident.

So, too, should be the majority's implicit logic. The majority gave "considerable deference" to the District Court's finding of fact that preparing for an illegal strike is a "reasonable bargaining too[l]".[19] But what is a "reasonable *bargaining* too[l]" ultimately depends, as a matter of law, on what is the controlling definition of "collective bargaining". One would presume that the sources of this definition would be: *first*, the State statute authorizing such bargaining (including those provisions limiting or outlawing various activities, such as strikes); and *second*, the State and United States Constitutions. Here, the Court of Appeals' majority has held that "collective bargaining" embraces patently and undeniably *illegal* activities. Thus, by the perverse reasoning of the majority, in Michigan *"collective bargaining" is not defined by law at all*, in the sense of being intelligibly limited by reference to the Constitution, State statutes, court decisions, and so on. Rather, "collective bargaining" subsumes whatever tactics—legal *or illegal*—the union, in its unilateral discretion, finds to be sharp-edged weapons for intimidating the employer.[20]

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[18] 881 F.2d at 1393-94 (emphasis supplied).

[19] *Id.* at 1394.

[20] *See Lehnert* v. *Ferris Faculty Association-MEA-NEA*, 634 F. Supp. 1306, 1312-13 (W.D. Mich. 1986). The Court of Appeals' majority emphasizes that "the union did not actually engage in an illegal strike". 881 F.2d at 1393. But if the union *never intended* to call a strike, *and the employer was fully aware of*

In sum, if the Court of Appeals' majority-decision stands, at least in the Sixth Circuit public-sector exclusive representatives will hereafter be suffered to posture, not only as those employees' political controllers (in direct violation of *Abood*), but also as a species of workplace *Mafiosi* licensed to extort payments from such employees for purely illegal purposes. And for this reason alone, a writ of certiorari should be issued.

CONCLUSION

The Court of Appeals' majority-decision is more than a fatally flawed application of *Abood* and *Ellis*. By allowing unions to collect "agency fees" *both* for otherwise lawful political and ideological activities that are nevertheless *not "integral"* to the process of statutory collective bargaining *and* for plainly *illegal* activities that are outside that process by definition, the majority has, in effect, attempted to *reverse* the central holdings of those cases outright.

Absent this Court's timely intervention, intellectual and legal chaos in the policing of "agency-fee" schemes throughout the country will predictably ensue.

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this pacific stance, the cost of preparations for a act that would never occur could hardly be considered a "reasonable" charge against nonunion employees. What kind of a "bargaining too[l]" is a hollow threat to strike that everyone knows is a mere charade?

This Court can gauge for itself the magnitude of the potential problem by noting that teacher-strikes in Michigan in 1989-1990 involved some 2,046 teachers and 40,742 students. *The Government Union Critique*, Vol. 11, No. 18 (21 July 1989), at 4.

For these reasons, the petition should be granted.

Respectfully submitted,

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BRIEF FOR THE PETITIONERS

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July 26, 1990

QUESTIONS PRESENTED

Do the first and fourteenth amendments to the United States Constitution permit a public employer to compel objecting nonunion public employees to contribute, as a condition of their employment, to the costs of the following activities engaged in by their exclusive bargaining representative and its state and national affiliates:

a) bargaining, litigation, and other activities, including political and ideological activities, on behalf of persons in other bargaining units, other states, and different professions, and retirees;

b) lobbying at state and federal levels on measures not for ratification of, or authorization or appropriation of funds for, the bargaining agreement covering the employees' bargaining unit;

c) electoral politics, including campaigns concerning ballot issues;

d) public relations activities;

e) non-bargaining activities related only generally to the employees' profession;

f) meetings of the affiliates that primarily serve political and ideological purposes; and,

g) threatening and preparing for illegal strikes?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the parties to the proceedings below were:

Petitioners: Elmer G. Junker, James E. Lindsey, Sam C. Peticolas, John R. Schauble, and Theodore D. Speerman.

Respondents: Michigan Education Association; National Education Association of the United States; the Board of Control of Ferris State College; Earl D. Gabriel, Robert P. Gerholz, Fran Harris, Delbert D. Long, Robert C. Redman, Thomas P. Scholler, Patricia M. Short, and Steven L. Thomas, members of the Board of Control of Ferris State College, in their official capacities; Robert L. Ewigleben, President of Ferris State College, in his official capacity; S. Eugene Bychinsky, Vice President, Personnel, of Ferris State College, in his official capacity.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1990

No. 89-1217

JAMES P. LEHNERT, *et al.*,

Petitioners,

v.

THE FERRIS FACULTY ASSOCIATION-MEA-NEA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Sixth Circuit are reported at 881 F.2d 1388 (Petition Appendix ("P.A.") 1a); its unreported judgment is reprinted in the Joint Appendix ("J.A.") at 129. The opinion and judgment of the United States District Court for the Western District of Michigan are reported at 643 F. Supp. 1306 (P.A. 18a); its opinion denying a motion for new trial and to alter or amend judgment is reported at 685 F. Supp. 164 (P.A. 81a).[1]

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[1] Earlier opinions of the district court not relevant to the questions presented are reported at 556 F. Supp. 309 (denying motions to dismiss and for abstention and summary judgment) and 556 F. Supp. 316 (denying motion for protective order).

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1989. On September 19, 1989, petitioners were granted leave to file a petition for rehearing one day out of time, *i.e.*, on August 29, 1989, when the court of appeals received it. P.A. 89a. Rehearing was denied on November 7, 1989. P.A. 90a. A timely petition for certiorari was filed on January 30, 1990. 58 U.S.L.W. 3505; *see Bowman v. Loperena*, 311 U.S. 262, 266 (1940). This Court granted the writ on June 11, 1990. 58 U.S.L.W. 3785. The jurisdiction of the Court rests on 28 U.S.C.A. § 1254(1) (West Supp. 1990).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first amendment to the United States Constitution states in pertinent part: "Congress shall make no law * * * abridging the freedom of speech * * * or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Section 1 of the fourteenth amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law." The Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982), says in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The state statutes involved are the Michigan Public Employment Relations Act ("PERA"), Mich. Comp. Laws §§ 423.201-.216 (1979), and Michigan Compiled Laws § 408.477 (1979).

Their pertinent provisions are reprinted in the Petition Appendix at, respectively, 92a and 95a.

STATEMENT OF THE CASE

Petitioners ("the nonmembers") are six present or former faculty members employed by Ferris State College ("Ferris"), a four-year public institution of higher learning in Michigan. Although not union members, they are or were in a bargaining unit, consisting only of faculty at Ferris, represented exclusively for purposes of collective bargaining by a union, the Ferris Faculty Association ("FFA"). P.A. 1a-2a. During fiscal 1981-82 there was an average of 502 full-time equivalent employees, including five of the nonmembers, in the unit. P.A. 24a.

The FFA, which represents only the one unit, is affiliated with the Michigan ("MEA") and National ("NEA") Education Associations. Under an "agency shop" provision in the bargaining agreements in effect since 1981, as authorized by the PERA, Mich. Comp. Laws § 423.210 (P.A. 92a-93a), and Michigan Compiled Laws § 408.477 (P.A. 95a), Ferris automatically deducted from nonmembers' pay a "service fee" equal to the dues of members of the FFA, MEA, and NEA ("the unions"), "less any amounts not permitted by law." P.A. 19a-23a & n.3.

The MEA and NEA have many other local affiliates which represent employees elsewhere in Michigan and other states, including states where public-sector bargaining is not permitted. Some locals represent faculty at other higher education institutions, but most represent teachers in public elementary, intermediate, or high schools ("K-12"). Others represent faculty or teachers in private or parochial education, and yet others represent educational support personnel (*e.g.*, school secretaries and nurses). In addition, services are provided to retired members. *E.g.*, J.A. 29, 86; 144-46, 150 (J.A. 51-52); 232 (J.A.

24-26); 271 (J.A. 27-28).[2] The MEA and NEA are "highly politicized organization[s], active in causes both related and unrelated to collective bargaining, contract administration and grievance adjustment." P.A. 32a, 39a.

On the authority of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the nonmembers objected to the exaction of service fees for any purpose other than the performance of the FFA's duties as exclusive representative of the Ferris unit. P.A. 25a. They brought this civil rights action under, *inter alia*, 42 U.S.C. § 1983, claiming that the freedoms of speech, thought, conscience, assembly, petition, and association secured to them by the first and fourteenth amendments are violated to the extent that the fee includes the costs of such other activities. Federal jurisdiction is based on 28 U.S.C. §§ 1331 and 1343 (1982). In addition to the unions, the governing Board of Control of Ferris, its members and two officers of Ferris, in their official capacities, were named as defendants. P.A. 18a-20a.[3]

In pre-trial proceedings, the parties agreed that the issue of which union expenditures constitutionally are chargeable to objecting nonmembers would be tried only with regard to the unions' fiscal year 1981-82. A portion of the fees demanded of the nonmembers for that year was put in escrow. P.A. 23a-24a. After a twelve-day bench trial at which the court heard twelve witnesses and admitted ninety exhibits, judgment was entered for the nonmembers. P.A. 19a, 77a-78a.

The district court held that certain union expenditures were chargeable, others were not as a matter of law, and yet others were not because the unions did not meet their burden of proof. P.A. 44a-66a. The judgment required restitution of most of the

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[2] Joint Appendix references which include parentheticals are to trial exhibits and the pages at which they were offered and admitted.

[3] Pursuant to stipulation and order, only injunctive relief was sought against the nonunion defendants. P.A. 19a.

nonmembers' escrowed funds, but ordered that the unions were entitled to specified amounts for 1981-82. P.A. 77a-78a.[4]

A motion by the unions for partial new trial and to alter or amend the judgment was denied. P.A. 87a. They noticed appeal, and the nonmembers filed a timely cross-appeal. J.A. 4. After a partial settlement agreement, the unions dismissed their appeal; the cross-appeal was limited to the contention that the district court erred in concluding that the costs of certain activities were constitutionally chargeable to the nonmembers. P.A. 3a. The challenged activities included: (1) activities on behalf of persons not employed in the FFA's bargaining unit; (2) lobbying; (3) electoral politics; (4) public relations; (5) professional/educational activities; (6) conventions of the MEA and NEA and meetings of another level of the unions' structure, the 13E Coordinating Council; and (7) preparations for illegal strikes. P.A. 5a-12a.

The court of appeals affirmed. P.A. 13a. Judge Merritt concurred that the costs of the MEA and NEA conventions and 13E meetings are constitutionally chargeable. However, he vigorously dissented with regard to the other disputed activities. P.A. 13a-17a. Because less than a majority of all active judges of the court of appeals favored a suggestion of en banc consideration, a petition for rehearing was referred to the original panel. It denied rehearing. P.A. 90a.

SUMMARY OF THE ARGUMENT

In its compulsory dues and patronage cases, the Court has held that infringements on the freedoms not to speak, associate, and petition government can be permitted only if narrowly tailored to serve a compelling state interest. The only governmental interest that agency-shop arrangements serve is to

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[4] The judgment also enjoined deduction of fees until further order, because the unions' collection procedures were unconstitutional under *Teachers Local 1 v. Hudson*, 475 U. S. 292 (1986). P.A. 66a-75a, 78a.

reimburse an exclusive representative of the employees in a bargaining unit for costs incurred in performing its statutory duties of dealing with their employer on labor-management issues. Objecting nonunion public employees cannot be charged for activities which add significantly to the serious infringement on their first-amendment rights inherent in coerced support of even bargaining and contract administration with their employer, unless the activities are necessary to the performance of those statutory duties.

None of the activities at issue here meets that test. All significantly add to the infringement on the nonmembers' first-amendment rights. Litigation and other activities on behalf of persons not in the nonmembers' unit, even if bargaining-related, are not essential to the union's performance of its statutory duties as *the nonmembers'* bargaining agent. Lobbying, ballot campaigns and other political activities (including meetings of the bargaining agent's affiliates), public relations, and non-bargaining activities related only generally to the employees' profession are not *necessary* to bargaining and contract administration anywhere and, in most cases here, did not directly concern the nonmembers' bargaining unit. The final activity at issue, threatening and preparing for a strike, was the only one directly related to that unit, but it served *no* conceivable state interest, because public-sector strikes are illegal in Michigan.

ARGUMENT

I. CHARGEABLE COSTS MUST DIRECTLY SERVE A COMPELLING STATE INTEREST TO MINIMIZE INFRINGEMENT ON FIRST-AMENDMENT RIGHTS

Abood, 431 U.S. at 232, held that a public-sector agency shop is constitutionally valid only "insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes." It also held that dissenting nonmembers "may constitutionally prevent the Union's spending

a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." The first amendment prohibits a union from spending coerced fees for political and "other ideological causes not germane to its duties as collective-bargaining representative." *Id.* at 234-36.

Because of the case's posture, *Abood* did not further define what, and where, union activities can constitutionally be financed from dissenters' service fees. It did suggest that the answer to those "constitutional questions" depends on the extent to which "activities fall outside the Union's duties as exclusive representative or involve constitutionally protected rights of association." *Id.* at 236-37 & n.33.

The Court has not addressed these issues more specifically in the context of a public-sector agency shop. However, chargeable costs must be defined narrowly in this context because, "first, * * * *any* withholding of financial support for a public-sector union is within the protection of the First Amendment; and, second, * * * the State * * * bear[s] the burden of proving that any union dues or fees that it requires of nonunion employees are needed to serve paramount governmental interests." *Id.* at 255 (Powell, J., concurring in the judgment). Those principles are implicit in the opinion of the Court in *Abood* and were reiterated explicitly in later related decisions, including two last Term.

Abood held that compelling "contributions for political purposes works * * * an infringement of * * * constitutional rights." *Id.* at 234. It also recognized that to "compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests," even when the union is engaged in bargaining and contract administration. *Id.* at 222. As Justice Powell said, "compelling a government employee to give financial support to a union in the public sector—regardless of the uses to which the union puts the contribution—impinges *seriously* upon interests in free speech and

association protected by the First Amendment." *Id.* at 255 (emphasis added).

Justice Powell's formulation of the principle was adopted in *Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984) (emphasis added): "by allowing the union shop at all, we have already countenanced a *significant* impingement on First Amendment rights." It was repeated twice more in *Teachers Local 1 v. Hudson*, 475 U.S. 292, 301 & n.8, 307 n.20 (1986), a public-sector case which cited *Ellis* and the opinions of both the Court and Justice Powell in *Abood* for the proposition.

Abood also established that first-amendment strict scrutiny is required in deciding whether union activities may be charged to objecting nonmembers. It held that the public-sector agency shop is constitutional insofar as the service fee is used for "collective bargaining, contract administration, and grievance adjustment," despite "the impingement upon associational freedom," because it is supported by "the same *important* government interests recognized in" *Railway Employes' Department v. Hanson*, 351 U.S 225 (1956), and *Machinists v. Street*, 367 U.S. 740 (1961). *Abood*, 431 U.S. at 225-26 (emphasis added).

Moreover, in holding that a union may not constitutionally expend compulsory fees for "ideological activities unrelated to collective bargaining," *Abood*, 431 U.S. at 232-36, relied on decisions prohibiting government from infringing on free association or requiring relinquishment of first-amendment rights as a condition of public employment unless a vital governmental interest is served directly and narrowly. The case cited most often there was *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality opinion). Again, Justice Powell explicitly stated the controlling principle established by those cases and, thus, implicit in the majority opinion in *Abood*: "even in public employment, 'a significant impairment of First Amendment rights must survive

exacting scrutiny.'" *Abood*, 431 U.S. at 259 (citing *Elrod*, 427 U.S. at 362 (plurality opinion), 381 (Powell, J., dissenting)).[5]

That rule was later applied in *Ellis*. While based partly on construction of § 2, Eleventh of the Railway Labor Act ("RLA"), 45 U.S.C. § 152, Eleventh (1982), *Ellis* has first-amendment underpinnings. *See Roberts v. United States Jaycees*, 468 U.S. 609, 637-38 (1984) (O'Connor, J., concurring). A narrow test for what is chargeable to objecting nonmembers was announced in *Ellis*, 466 U.S. at 444-48, "to avoid the constitutional difficulty" raised by the argument that the disputed expenditures violated the first amendment.

And, in deciding whether particular union expenses are constitutionally chargeable, *Ellis*, 466 U.S. at 455-56 (emphasis added), said that the issue is whether they "involve additional interference with the First Amendment interests of objecting employees, and, if so, whether they are nonetheless *adequately* supported by a *governmental* interest." *Ellis* thus applied strict scrutiny to all disputed activities which "have direct communicative content and involve the expression of ideas" (conventions, publications, organizing, and litigation), determining whether they directly served the governmental interest underlying § 2, Eleventh, *i.e.*, "to require all members of a bargaining unit to pay their fair share of the costs of performing the function of exclusive bargaining agent." *Id.* at 446, 456.

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[5] Although Justice Powell believed that patronage serves a compelling state interest, he agreed with the majority in *Elrod* and *Branti v. Finkel*, 445 U.S. 507, 527-28 (1980) (Powell, J., dissenting), that it, like state coerced support of unions, is unconstitutional unless that exacting test is met. Lower courts also have concluded that "[i]mplicit in Justice Stewart's opinion in *Abood* is the recognition that, when the government impinges on an individual's associational rights—either by prohibiting or compelling association—such action cannot be sustained unless it is justified by a compelling governmental interest." *Galda v. Bloustein*, 686 F.2d 159, 164 (3d Cir. 1982); *accord, e.g., Gibson v. Florida Bar*, 798 F.2d 1564, 1569 (11th Cir. 1986).

The conventions and portions of publications held chargeable met the stricter part of the *Ellis* test that to be chargeable costs must be "necessarily * * * incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues," *id.* at 448. The Court found that conventions "such as those at issue here are * * * *essential* to the union's discharge of its duties as bargaining agent"; and, that the "union *must* have a channel for communicating with the employees" about "those activities it can charge them for doing." *Id.* at 448-51 (emphasis added).

The Ninth Circuit had ruled that costs of organizing and all litigation met the less exacting part of the *Ellis* test, *i.e.*, are "reasonably incurred for the purpose of performing" statutory duties in the objectors' bargaining unit, since those activities "strengthened the union as a whole" and "ultimately benefited * * * collective-bargaining efforts" in that unit. *Id.* at 441, 448. Nonetheless, because organizing and litigation outside the unit are not necessarily incurred for bargaining in it, this Court held them not chargeable. *Id.* at 451-53. The only activity which the Court found chargeable under the broader "reasonably incurred" test was union social activities which had no inherent communicative content. *Id.* at 449-50, 456.

The rights at stake here are wholly constitutional, not partly statutory as in *Ellis*, because the Michigan agency-shop statute, Mich. Comp. Laws § 423.210(10)(1)(c), (2) (P.A. 92a-93a), "'sanctions the use of nonunion members' fees for purposes other than collective bargaining.'" *Abood*, 431 U.S. at 232 (quoting *Abood v. Detroit Bd. of Educ.*, 60 Mich. App. 92, 99, 230 N.W.2d 322, 326, *appeal denied*, 395 Mich. 755 (1975), *vacated*, 431 U.S. 209 (1977)). However, as said in *Abood*, 431 U.S. at 240, "that difference surely could not justify any lesser relief in this case." Also, this is a public-sector case, but the "differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights." *Id.* at 232. Thus, although "in the public sector the line may be somewhat hazier," *id.* at 236, compulsion is prohibited by the first amendment here, as in *Ellis*, unless a disputed activity directly

advances the governmental interest that the agency shop is thought to serve.

Any prior doubt that normal first-amendment strict scrutiny is necessary in defining chargeable costs under a public-sector agency shop was dispelled by *Hudson*. Because *Hudson* concerned the procedures for collecting service fees, it did not define "'the line between union expenditures that all employees must help defray and those that are not sufficiently related to collective bargaining to justify their being imposed on dissenters.'" *Hudson*, 475 U.S. at 294 (quoting *Ellis*, 466 U.S. at 447), 304 n.13. Nonetheless, *Hudson* has significance in drawing that line.

In *Hudson*, 475 U.S. at 302-03 & n.11 (footnote omitted), the Court relied on *Roberts*, 468 U.S. at 623 (which cited *Abood*), *Elrod*, 427 U.S. at 363, and earlier statements of the strict-scrutiny test for the conclusion that,

> although the government interest in labor peace is strong enough to support an "agency shop" notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure [for determining chargeable costs] be carefully tailored to minimize the infringement.

There is far greater reason to tailor carefully and apply narrowly the legal standard for determining chargeable costs, because the legal standard is even more important to that determination than the procedure by which the standard is applied.

Although the panel majority below recognized that the *Ellis* test applies here, P.A. 4a, it ignored *Hudson*'s command of strict scrutiny. Consequently, as Judge Merritt pointed out, the majority "significantly expand[ed] *Ellis* without justification and without serious attention to the protections of the First Amendment," P.A. 14a (dissenting), as two decisions in the 1989 Term demonstrate.

First, *Keller v. State Bar*, 110 S. Ct. 2228, 2236 (1990) (emphasis added), found that "useful guidelines for determining permissible expenditures" in the context of first-amendment challenges to compulsory bar dues are provided by the *Ellis* test that chargeable expenditures must be "necessarily or reasonably incurred" for "the purpose for which compelled association was justified" by "*vital* national interests." *Keller* also interpreted those guidelines narrowly. By statute, "the State Bar was authorized to '"aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice."'" *Id.* (quoting *Keller v. State Bar*, 47 Cal. 3d 1152, 1169, 767 P.2d 1020, 1030, 255 Cal. Rptr. 542, 552 (1989), *rev'd*, 110 S. Ct. 2228 (1990)). A simple comparison "might suggest that there is little difference between" that language and the "guiding standard" derived from *Ellis*. "But there is a difference," this Court held, which the California court erroneously overlooked when it ruled that the Bar "may use the dues for any purpose within its broad statutory authority." *Id.* at 2231, 2236. That "difference" is that objectors' dues constitutionally may be used only when the Bar is "acting *essentially*" in the state-created role which justifies compulsory bar dues, *i.e.*, in regulating the legal profession. *Id.* at 2236-37 (emphasis added).

Second, *Rutan v. Republican Party*, 58 U.S.L.W. 4872, 4875-76 (U.S. June 21, 1990) (No. 88-1872), affirmed in the strongest terms yet the need for strict scrutiny in reviewing practices which condition public employment on support for private organizations engaged in ideological activity: "The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate." Unless such practices "are *narrowly tailored* to further *vital government* interests, we must conclude that they impermissibly encroach on First Amendment freedoms." *Id.* at 4875 (emphasis added); *compare Hudson*, 431 U.S. at 302-03.

II. MICHIGAN'S ONLY COMPELLING INTEREST IN THE AGENCY SHOP IS REIMBURSEMENT OF THE COSTS OF PROVIDING STATUTORY REPRESENTATION TO THE NONMEMBERS' BARGAINING UNIT

In identifying an interest which can justify coerced speech and association, "care must be taken not to confuse the interest of partisan organizations with governmental interests." *Elrod*, 427 U.S. at 362. The "governmental interests advanced by the agency-shop provision in the Michigan statute are much the same as those promoted by similar provisions in federal labor law." *Abood*, 431 U.S. at 224. Those interests, as repeatedly identified by the Court, are "to eliminate free riders—employees *in the bargaining unit* on whose behalf the union was *obliged* to perform *its statutory functions*, but who refused to contribute to the cost *thereof*." *Ellis*, 466 U.S. at 447 (emphasis added); *accord*, *e.g.*, *Abood*, 431 U.S. at 221-22, 224; *Street*, 367 U.S. at 764 & n.15.

Indeed, *Abood* noted that Michigan's public-sector agency-shop statute "was specifically designed to authorize agency shops in order that 'employees in the bargaining unit share fairly in the financial support of *their* exclusive *bargaining* representative. . . .' " 431 U.S. at 224 (quoting Mich. Comp. Laws § 423.210(2) (P.A.92a)) (emphasis added). It was that limited interest alone which led the Court to hold that *Hanson* and *Street* were conclusive as to the constitutionality of the statute "insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes." *Id.* at 223-32.

Abood's use of that particular phrase to describe "the costs of exclusive representation," *id.* at 229, was not casual. Under Michigan's PERA, a union is "the exclusive representative of all the public employees *in [an appropriate] unit for the purposes of collective bargaining* in respect to rates of pay, wages, hours of employment or other conditions of employment * * * " and must be permitted to participate in the adjustment of employee grievances. Mich. Comp. Laws § 423.211 (P.A. 93a) (emphasis added). Collective bargaining is defined as

> the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract, ordinance or resolution incorporating any agreement reached * * * .

Mich. Comp. Laws § 423.215 (P.A. 93a-94a).

Thus, *the only functions imposed by the statute upon an exclusive representative are to engage in collective bargaining, contract administration, and grievance adjustment*, as the MEA's Director of Legal Services testified. J.A. 24. As under the federal labor statutes, a union is exclusive representative, and has a duty of fair representation, only for services that "gro[w] out of the collective bargaining relationship," not all "services that are employment-related," *National Treasury Employees Union v. FLRA*, 800 F.2d 1165, 1168-71 (D.C. Cir. 1986) (opinion by Bork, J.). And, by definition, *there is no statutory obligation to perform any functions on behalf of, and no duty of fair representation owed to, anyone except the employees in the one unit. See Ellis*, 466 U.S. at 451-53; *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 375-76 & n.22 (1984).

Necessarily then, under the first amendment, as under the RLA as construed to avoid constitutional difficulty, the test is not whether a disputed activity relates to bargaining somewhere or somehow impacts on the employees' bargaining unit. Rather, it

> must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative *of the employees in dealing with the employer on labor-management issues*. Under this standard, objecting employees may be compelled to pay their fair share of * * * the direct costs of negotiating and administering *a* collective-bargaining contract and of settling grievances and disputes, [and] the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union *as exclusive representative of the employees in the bargaining unit*.

Ellis, 466 U.S. at 448 (emphasis added); *accord Communications Workers v. Beck*, 487 U.S. 735, 762-63 (1988).

Under that test, applied strictly as the first amendment requires, the proper question with regard to every activity disputed here is, as Judge Merritt put it, whether it was "directly" or "closely" related to bargaining, contract administration, and grievance adjustment by the FFA on behalf of the faculty at Ferris. P.A. 13a-16a (dissenting).[6] Indeed, before this case, that was the Sixth Circuit's standard: the union "may collect only for those expenses *affirmatively* related to *the* bargaining agreement because these constitute the only expenditures that, consistent with the First and Fourteenth Amendments under *Abood* and *Hudson*, the union may collect to prevent non-members' 'free riding.'" *Tierney v. City of Toledo*, 824 F.2d 1497, 1505 (6th Cir. 1987) (emphasis altered).[7]

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[6] This is the only principled way to draw the line, because, as one comment on *Abood* pointed out, "[a]lmost any expenditure made by a union is connected in some way to its duties as collective bargaining representative." The article concluded that, to reconcile *Abood* with *Street*, the line must be drawn so that only "expenditures incident to the negotiation and administration of [the] specific contract" are chargeable. *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 70, 196-97 (1977). A critic of *Ellis* concurs that its "test inquires whether a particular expenditure was authorized by a policy * * * of requiring nonmember employee support only for specific collective bargaining services rendered on behalf of the payor or her unit." Friesen, *The Costs of "Fee Speech"—Restrictions on the Use of Union Dues to Fund New Organizing*, 15 Hastings Const. L.Q. 603, 624 (1988).

[7] The line was also drawn strictly in *Hudson v. Teachers Local 1*, 743 F.2d 1187, 1193 (7th Cir. 1984) (emphasis added), *aff'd on other grounds*, 475 U.S. 292 (1986): **[note continued over]**

III. ACTIVITIES OUTSIDE THE STATUTORY DUTIES OF THE NONMEMBERS' EXCLUSIVE REPRESENTATIVE WERE ERRONEOUSLY HELD CHARGEABLE

The courts below clearly applied a much broader standard of chargeability than permitted by first-amendment strict scrutiny and the limited state interest that justifies the agency shop. Under their rulings, in calculating a service fee a public-sector union may ignore the bargaining unit and the statutory definition of its duties as a nonmember's exclusive representative; the union may charge nonmembers for activities, even if political or ideological, of it and its affiliates as long as those activities appear to advance some employment-related interest of employees (or former employees) they represent somewhere. P.A. 5a-12a, 51a-57a. Because unions presumably intend everything they do to advance some employment-related interest of some employee they represent, the practical effect is to give *carte blanche* to unions in collecting compulsory fees from public employees.

As in *Ellis*, 466 U.S. at 448-57, in assessing where the lower courts erred, the correct standard must be applied to each disputed type of activity. In conducting that review, this Court should examine anew the entire pertinent record, because the ultimate issue as to each category—whether that type of speech and association may be compelled—is a question of law under the first amendment. *Compare Rankin v. McPherson*, 483 U.S. 378,

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> the state cannot deprive an individual of his freedom of association by forcing him to support a union, except in accordance with procedures that reasonably assure that the deprivation will go *no further than is necessary* to prevent the individual from taking a free ride on an entity that * * * is providing *services to him as his collective bargaining representative*.

This Court and one judge on the Seventh Circuit panel found it unnecessary there to address what activities are constitutionally nonchargeable. *Hudson*, 475 U.S. at 304 n.13; *id.*, 743 F.2d at 1197-98 (Flaum, J., concurring in the result).

384-86 & n.9 (1987), *with Abood*, 431 U.S. at 236-37 & n.33; *see Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 173-76 & n.5 (1976) (independently determining what constitutes "negotiating").

A. ACTIVITIES ON BEHALF OF PERSONS NOT IN THE NONMEMBERS' BARGAINING UNIT

One of the "direct expenditures" of the MEA that the district court held chargeable was the cost of 81.6% of the *Teacher's Voice*, the MEA's primary publication. The "chargeable" portion included all 779 column inches categorized as "Collective Bargaining," 1,816 of the 1,895.5 categorized as "Lobbying," 79 of the 97 categorized as "Litigation," and 627 of the 637.5 categorized as "Administrative." P.A. 63a, 80a.

The analysis of the contents of the *Teacher's Voice* used by the court and the actual articles show that *none* listed as "Collective Bargaining" and "Litigation" concern Ferris; indeed, few concern public higher education at all, several deal with support personnel, two discuss litigation related to organizing in the private-sector, and one is about the air traffic controllers' dispute with the Reagan Administration. J.A. 198-204, 229-30 (J.A. 24-26), & Pl.Ex. 612 (J.A. 27-28), as referenced therein (*e.g.*, J.A. 271).[8] Also, many articles found chargeable in the "Lobbying," "Litigation," and "Administrative" categories, some of which report on organizing, are about retirees, support personnel, or

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[8] The unions agreed that column inches and titles of articles in the *Teacher's Voice* were accurately listed in the content analysis (J.A. 197 (J.A. 24-26)); the notations "NC" in the analysis are the MEA's legal director's indication of articles conceded to be nonchargeable. J.A. 19-21, 24-27. Plaintiffs' Exhibit 612, Volume 59 of the *Teacher's Voice*, was reproduced in the Sixth Circuit as Joint Appendix Volume IV; for the convenience of the Court, additional copies have been lodged with the Clerk's office.

school nurses. J.A. 204-17, 229-36 (J.A. 24-26), & Pl.Ex. 612 as referenced therein.[9]

Similarly, several of the NEA "program expenditures" held chargeable were earmarked for states other than Michigan (including states in which collective bargaining was not authorized), for support personnel, or for retirees: Affiliate Services' program 5.1 was for bargaining projects in Alabama, Alaska, Colorado, Nevada, North Dakota, South Dakota, Vermont, West Virginia, and Wyoming;[10] Research programs 2.4 and 2.5 consisted of research for school support personnel and on retirement issues (including the preparation of legislative testimony); and Research program 5.2 was for studies on "school finance" in Idaho, Vermont, Delaware, Maryland, New Hampshire, Maine, Oregon, and Arizona.[11] The other NEA programs held chargeable possibly related to bargaining somewhere, but the unions did not show that they related to bargaining at Ferris: Affiliate Services' programs 5.2 and 5.3, and Research programs 2.1, 2.2, 2.3, 2.6, and 5.1. P.A. 65a-66a; J.A. 293-300 (J.A. 37-39).

The court of appeals' panel upheld charging the nonmembers for those activities on behalf of persons not employed in their

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9 "Lobbying" articles about retirement legislation, and "Administrative" articles about support personnel, school nurses, and organizing contain more column inches than the district court held nonchargeable in each category. Thus, it must have considered them chargeable. The court also apparently treated articles about retirement-related litigation as chargeable, because the number of inches held nonchargeable under "Litigation" equals the number so characterized by the MEA, and none of the articles marked "NC" concern retirement. *Compare* P.A. 80a *with* J.A. 204-17, 229-36.

10 Collective bargaining was not authorized for educational employees in Alabama and Wyoming. Ala. Code §§ 16-8-10, 16-11-18 (1975) ("consultation" only); *Retail Clerks Local 187 v. University of Wyo.*, 531 P.2d 884 (Wyo. 1975).

11 Collective bargaining was prohibited for educational employees in Arizona. *Communications Workers v. Arizona Bd. of Regents*, 17 Ariz. App. 398, 498 P.2d 472 (1972); 1974 Op. Ariz. Atty. Gen. 31.

bargaining unit (or activities not shown to be related to it). The majority interpreted *Ellis* as holding that, if expenditures are of a type that would be chargeable to someone, they are chargeable to dissenting employees "even if the chargeable activities * * * were *unrelated* to the specific bargaining unit of the dissenting employees." P.A. 10a-11a. They did not quote language so holding in *Ellis*, because *Ellis* actually held precisely the opposite, as Judge Merritt recognized. P.A. 13a-16a (dissenting). As discussed *supra* pp. 13-15, the overall holding of *Ellis*, 466 U.S. at 448, is that compulsory fees can only include costs which an exclusive representative, and its affiliates, incur in performing its statutory duties as bargaining agent for the dissenters' unit in dealing with their employer on labor-management issues.

Moreover, in considering two expense categories challenged in *Ellis*, organizing and litigation, the Court explicitly and emphatically used a bargaining-unit limit. Organizing expenses are not chargeable, because they "are spent on employees outside the collective-bargaining unit already represented." *Id.* at 452.[12] And, "unless the[ir] bargaining unit is directly concerned, objecting employees need not share the costs of the union's [litigation]." *Id.* at 453. The panel majority ignored those holdings, citing instead the rulings of *Ellis* as to the union's convention and publication. *See* P.A. 10a-11a. However, those rulings also are fully consistent with a bargaining-unit standard.

The convention was chargeable in *Ellis*, because it was "essential to the union's discharge of its duties as bargaining agent" *for the dissenters' unit*. *Ellis*, 466 U.S. at 448-49.[13] And,

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12 That *Ellis*, 466 U.S. at 452 n.13, also disallowed organizing within the unit on another ground does not vitiate the importance of its *rationale* for holding that organizing outside the unit is not chargeable.

13 In *Ellis*, the national union was itself the exclusive representative and negotiated, executed, and administered the bargaining agreement covering the dissenting employees. Brief for Respondents at 1, 25-27, *Ellis* (No. 82-1150); *see Ellis v. Railway Clerks*, 685 F.2d 1065, 1073 (9th Cir. 1982), *aff'd in part, rev'd*

[noted continued over]

despite the panel majority's claim, *Ellis* did not hold that the costs of a union publication are chargeable "even if the chargeable activities reported on were *unrelated* to the specific bargaining unit of the dissenting employees," P.A. 10a. *Ellis*, 466 U.S. at 451 & n.11 (emphasis added), held only that the union could "charge objecting employees for reporting to them about those activities it can charge *them* for doing," *not* for reporting about activities for which it "cannot spend dissenters' funds," including organizing and litigation not directly concerning their bargaining unit. In short, publications are subject to the bargaining-unit limitation.

The district court viewed the *Ellis* bargaining-unit standard as only statutory. P.A. 55a-56a. However, it is required by first-amendment strict scrutiny.

The only interference with first-amendment rights that necessarily inheres in the agency shop is that it forces employees to support financially an organization with which they may disagree when it negotiates and administers a collective agreement *with their employer*. *See Ellis*, 466 U.S. at 455; *Abood*, 431 U.S. at 222, 257-58. Coerced subsidization of even non-unit bargaining adds substantially to that interference, because the labor relations of *other persons* "are matters of public concern," speech and association concerning which are fully protected by the first amendment. *Thornhill v. Alabama*, 310 U.S. 88, 102-05 (1940); *see DeBartolo Corp. v. Florida Gulf Coast Bldg. Trades Council*, 485 U.S. 568, 575-76 (1988). In the public sector, the added infringement is greater, because non-unit bargaining is *petitioning of government* on subjects other than *the objectors'* terms and conditions of employment.

Moreover, the "bargaining" activities in other units held chargeable here include organizing and litigation, in direct conflict with *Ellis*, 466 U.S. at 451-53. *See* P.A. 55a-57a, 80a; *supra* pp.

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in part, 466 U.S. 435 (1984). Thus, its convention, and its social activities, *Ellis*, 466 U.S. at 449-50, were directly related to representation of the objectors' unit, as well as other units with which it had the same relationship.

17-18 & note 9. Coerced subsidies of organizing and litigation not directly concerning the employees' bargaining unit compel association with other groups of workers for two additional forms of petition and speech that are fully protected by the first amendment. *See In re Primus*, 436 U.S. 412, 426-28 (1978) (litigation); *Thomas v. Collins*, 323 U.S. 516, 532 (1945) (organizing). And, most importantly, the issue here is not just the chargeability of "bargaining" activities in other units, but also whether nonmembers must subsidize lobbying, ballot campaigns, and other ideological activities that involve their unit only indirectly or not at all. *See supra* pp. 17-18; *infra* pp. 25-39.

The district court sought to justify those serious added infringements on first-amendment freedoms by citing the fact that "unions operate on a cost-sharing basis." P.A. 56a. That, however, is a voluntary decision made by unions, not a circumstance compelled by the state, much less a vital state interest. Indeed, Michigan disavowed *any* interest in "cost sharing" by permitting the employees at each separate unit to choose their own, potentially competing, bargaining agent. *See* Mich. Comp. Laws § 423.211 (P.A. 93a).

The district court's argument that "cooperative cross-funding" enables a union to more "effectively represent" each bargaining unit, P.A. 56a, is essentially the "bargaining power" argument that *Ellis* rejected with regard to organizing and non-unit litigation. *See* 466 U.S. at 441, 451-53.[14] It also ignores the testimony of an expert on economics, Professor Steven Hanke of Johns Hopkins University,[15] that direct costing by bargaining unit is more consistent with economic theory and

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[14] Even that fallacious argument does not justify charging activities on behalf of retirees. By definition retirees are no longer employed in any bargaining unit, *see* J.A. 29, and the union is no longer their bargaining agent and owes them no statutory duty of fair representation. *See Allied Chem. Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 & n.20 (1971).

[15] For his professional qualifications, *see* J.A. 64-70, 251-56.

practice. According to Hanke, averaging increases the risk that nonmembers will be compelled to subsidize nonchargeable activities, and there is no economic evidence that bargaining in one unit necessarily beneficially affects others. J.A. 71-84.

The last point is confirmed by the unions' witnesses and by the MEA's structure. Union officials and the unions' expert witness on labor relations conceded that bargaining and sources of funding are unique at higher education institutions, such as Ferris. J.A. 55-56, 91, 93, 106. Higher education units had a separate coordinator providing specialized services, and a separate organization, because of their "unique needs and concerns." J.A. 88-93. Similarly, support personnel had a separate organization and different dues structure, because some bargaining issues were significantly different in their units. J.A. 86-87, 95-97.[16]

Not surprisingly then, the unions' expert testified that bargaining in one unit may or may not establish a "pattern" for bargaining in another, depending on geographic area, labor market, type and number of employees involved, and many other economic variables, including the state of the economy. He admitted that even among similar units, "pattern bargaining" does not always occur, that the factors which determine whether a "pattern" is set are "constantly changing," and that a "pattern" may be set where the bargaining agents in two units are not affiliated. J.A. 100-07; *see* J.A. 56-57, 98.

In sum, as with organizing other units and "litigation seeking to protect the rights of [represented] employees generally," *Ellis*, 466 U.S. at 451-53, the connection between bargaining in different units is too "attenuated" to justify cross-subsidization. Nothing in this Court's opinions suggests that costs may be taxed to unwilling nonmembers simply because union members in more than one unit choose to affiliate, or because an activity might possibly provide indirect economic "benefit." The only "benefits"

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16 The Michigan Employment Relations Commission generally required that teaching and support personnel be in separate units. J.A. 29.

which justify compulsory fees are those received by employees from the activities of their exclusive representative which statutorily must be performed on behalf of " 'all employees . . . , union and nonunion,' *within the relevant unit*," and which, therefore, presumptively provide "benefits of union representation that *necessarily* accrue to all employees." *Abood*, 431 U.S. at 221-22 (quoting *Street*, 367 U.S. at 761) (emphasis added).[17]

The district court also sought to excuse its failure to follow *Ellis* by asserting that it "would create an unreasonable and unmanageable administrative burden" if the unions had to allocate litigation (or other) expenses by unit. P.A. 57a. Although union witnesses complained that it would be difficult to record expenses on that basis, they typically cited services provided simultaneously to more than one unit, such as general research or training. *See, e.g.*, J.A. 42-43, 84-85. The pro rata costs of such services, if chargeable in nature, can easily be determined by dividing their total costs by the number of employees in all units which receive them.

Moreover, the union witnesses' self-interested speculation was belied when they were asked about services provided *directly* to a particular unit, such as litigation and the services of field personnel. The MEA's legal director testified that, in fact, its litigation expenses *were already kept by bargaining unit*, without burden. J.A. 23, 30-32. And, the NEA's accounting manager admitted that its accounting records broke expenses "down to place and to function," and that field personnel could designate

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17 No evidence supports the district court's speculation that in some years a pro rata share of chargeable services provided to a bargaining unit might exceed dues, even though by statute the service fee cannot. *See* P.A. 56a-57a. In any event, while that concern might be a ground, present under the RLA as well as the PERA, for asking the legislature to amend the statute to permit service fees to exceed dues in such years, it is no reason to invade the first-amendment rights of nonmembers by forcing them to pay for services not provided to their unit in other years., Certainly, this Court did not see it as such when it adopted the bargaining-unit test in *Ellis*.

the units served on the time sheets indicating daily activities already kept by all of the NEA's employees. J.A. 40-41, 45.

In any event, "administrative convenience alone is insufficient to make valid what otherwise is a violation of [individual constitutional rights]." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 646-47 (1974); *see Keller*, 110 S. Ct. at 2237; *Ellis*, 466 U.S. at 444. It "is not unduly burdensome" to require an organization receiving a governmental benefit, because it engages in a certain activity, to "keep records adequate to show" that contributions for that purpose are used for it. *Regan v. Taxation With Representation*, 461 U.S. 540, 544 n.6 (1983).

In the free market, no one who provides services would be in business long if he charged all customers the same "average" fee for different services. Attorneys, accountants, plumbers, TV-repairmen, and others have devised practical and fair methods of recording and valuing time and costs and allocating them among clients. That nonmembers are compulsory "customers" of unions' services does not entitle them to any less precise a computation of their specific "bill." Even administrative agencies charging "user fees" have been required "to identify the *specific* items of direct or indirect cost incurred in providing *each* service or benefit for which [they] see[k] to assess a fee, and then to divide that cost among the members of the *recipient* class." *National Cable Television Ass'n v. FCC*, 554 F.2d 1094, 1105 (D.C. Cir. 1976) (emphasis added); *see FPC v. New England Power Co.*, 415 U.S. 345, 349-51 (1974).[18] Because first-amendment rights are at stake, at least as much is required of unions which seek the privilege of coercing bargaining fees from employees.

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[18] Professor Hanke testified that this is the only economically rational method of calculating user fees and public utility rates; other methods are "highly politicized" and arbitrary. J.A. 72-76.

B. LOBBYING

The district court held that three expenditures for lobbying were chargeable. One was an expenditure by the FFA for a "Preserve Public Education (PPE) Conference," which the court considered chargeable because the MEA's PPE program included lobbying "directed at securing funding for public education in Michigan." P.A. 30a, 58a.[19] The second was the cost of 1,816 column inches of the 1,895.5 categorized as "Lobbying" in the *Teacher's Voice*, more than the MEA claimed to be chargeable. *Compare* P.A. 63a, 80a, *with* J.A. 204-17 (J.A. 24-26). The third was NEA Research program 2.5, which included preparation of testimony and reports on legislative activity on federal bills affecting retirement. P.A. 65a; J.A. 297-98 (J.A. 37-39).

None of those expenditures was shown to be for lobbying for ratification of, or authorization or appropriation of funds under, the collective agreement between Ferris and the FFA. There was no evidence that the PPE conference concerned lobbying for anything more specific than "to obtain funds for public education generally," as the court of appeals' majority put it. *See* P.A. 8a-9a, 30a-31a, 58a; J.A. 186-87 (J.A. 114, 116-17); 263-64, 269-70 (J.A. 27-28). The NEA's lobbying on federal retirement legislation obviously is not closely related to bargaining at Ferris. And, only a small portion of the *Teacher's Voice* articles in the "Lobbying" category—certainly much less than the 96% found chargeable by the district court—even concern lobbying for funding of higher education institutions generally or on legislation that otherwise directly affected employment conditions in higher education. In addition to appropriations for public education generally, the articles cover such subjects as taxes, statutory retirement benefits, proposed abolition of the U.S. Department of Education, tuition tax credits, and federal aid to students. J.A. 204-17 (J.A. 24-26), & Pl.Ex. 612 (J.A. 27-28) as referenced therein (*e.g.*, J.A. 256-58, 272-75).

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[19] In fact, that program was not just lobbying, and the unions conceded that the PPE conference was unrelated to collective bargaining. *See infra* p. 32.

The lack of a direct relationship between the unions' lobbying and bargaining at Ferris is to be expected. Most employees represented by the MEA are in K-12, not higher, education, J.A. 144 (J.A. 51-52), and the funding of higher education in Michigan is "substantially different" from that of K-12 schools, J.A. 35, 91, 93. For example, much of the lobbying reported in the *Teacher's Voice* was in opposition to legislative proposals to cut property taxes. *E.g.*, J.A. 256-58. The MEA's director of Government Affairs testified that those proposals would not have affected Ferris, because it derives no revenue from property taxes. J.A. 119-120, 122-23.

"[A]ttempts to influence the passage or enforcement of laws," including "publicity campaign[s] to influence governmental action," are "political activity" the protection of which is at the core of the first amendment. *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 135-41 (1961); *see Keller*, 110 S. Ct. at 2231 & n.2, 2233-34; *Street*, 367 U.S. at 777 (Douglas, J., concurring), 788-91 (Black, J., dissenting). Coerced subsidies for lobbying clearly constitute substantial interference with first-amendment rights beyond that inherent in support of a bargaining agent's "dealing with the employer on labor-management issues," *Ellis*, 466 U.S. at 448. It therefore can only be permitted if narrowly related to the state interest that supports a compulsory fee. *See Keller*, 110 S. Ct. at 2236-37.

Both courts below conceded that dissenting employees may not be charged for lobbying in the private sector. P.A. 7a, 51a-52a; *accord Beck v. Communications Workers*, 776 F.2d 1187, 1210-11 (1985), *aff'd en banc*, 800 F.2d 1280 (4th Cir. 1986), *aff'd on other grounds*, 487 U.S. 735 (1988); *Ellis v. Railway Clerks*, 91 L.R.R.M. (BNA) 2339, 2342-43 (1976) (interlocutory summary judgment), *incorporated*, 108 L.R.R.M. 2648 (S.D. Cal. 1980), *aff'd in part, rev'd in part, on other grounds*, 685 F.2d 1065 (9th Cir. 1982), *aff'd in part, rev'd in part*, 466 U.S. 435 (1984). That was settled in *Street*, which, as described in *Ellis*, 466 U.S at 447 (emphasis added), held that objectors "could not be burdened with *any part* of the union's expenditures in support of political or ideological causes." *Street*, 367 U.S. at 768-69 & n.17 (quoting

Treas. Reg. § 1.162-14(c)(2)), specifically cited " 'expenditures for lobbying purposes, for the promotion or defeat of legislation, * * * or for carrying on propaganda * * * related to any of the foregoing purposes * * * ,' " as "political causes" for which objectors' funds may not be spent under the RLA.[20]

Despite *Street*, the panel majority and the district court held that "union lobbying to obtain funds for public education generally" or on measures that "otherwise directly impact on the terms and conditions of employment" of educational employees is chargeable, even if *un*related to the Ferris unit. They relied on the fact that *Abood* noted differences between collective bargaining in the public and private sectors. P.A. 7a-10a, 51a-54a, 58a. However, the courts' conclusion does not follow from and is, indeed, contrary to *Abood*. *See Beck*, 776 F.2d at 1211 n.31 (dictum).[21]

Abood, 431 U.S. at 232 (emphasis added), held that the "differences between public- and private-sector collective bargaining simply *do not translate into differences in First Amendment rights*." Michigan's authorization of the use of fees collected from objecting nonmembers for "political and ideological purposes unrelated to collective bargaining" was invalidated on first-amendment grounds in *Abood*, 431 U.S. at 232-36, precisely

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20 The separate opinions in *Street* agreed that the Court prohibited use of compulsory dues for legislative activities, whether on statutory or constitutional grounds. *See Street*, 367 U.S. at 777 (Douglas, J., concurring), 779 (Whittaker, J., concurring in part), 788-91 (Black, J., dissenting), 812-14 (Frankfurter, J., dissenting).

21 The panel majority also relied on *Knight v. Minnesota Community College Faculty Association*, 571 F. Supp. 1 (D. Minn. 1982) (3-judge court), *aff'd mem.*, 460 U.S. 1048 (1983). P.A. 7a. This Court's summary affirmance in *Knight* is not dispositive here, because *Knight*, 571 F. Supp. at 6, concerned only the constitutionality of public-sector exclusive representation; "[c]alculation of the fair share fee [wa]s not in dispute." *See Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 180-83 (1979); *Mandel v. Bradley*, 432 U.S. 173, 175-77 (1977).

because state law permits spending of those fees "for *legislative lobbying* and in support of political candidates," *id.* at 215, 232-33 & n.29 (emphasis added); *see Beck*, 776 F.2d at 1200, 1206.

Only in *dicta* did the Court speculate that a narrow class of lobbying might directly serve the only state interest that justifies the agency shop in the public sector: "The process of establishing *a written collective-bargaining agreement* * * * may require not merely concord at the bargaining table, but subsequent approval by other public authorities; *related* budgetary and appropriations decisions might be seen as an integral part of the bargaining process." *Id.* at 236 (emphasis added). Even there, as Judge Merritt explained, that "entire section from *Abood* makes clear that it is the relation of the challenged activity to the bargaining unit which is crucial." P.A. 13a (dissenting).

All that *Abood* intimated was that obtaining approval of a contract by a public body or official other than the government representatives who sit at the bargaining table is part of bargaining, and that contract administration includes lobbying the employees' public employer to budget and appropriate funds necessary to pay salaries and benefits set in the contract.[22] Here the *only* governmental body which ratifies and administers the contract with the FFA, and adopts and expends the budget of Ferris, is the Ferris Board of Control; the state and federal legislatures and other government agencies are not involved in those processes. Mich. Const. art. VIII, § 6; Mich. Comp. Laws §§ 390.802-.803 (1979); *see* J.A. 93-94, 125.

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[22] The Court probably had in mind circumstances under which the PERA requires "the employer" to execute an "ordinance or resolution incorporating [the] agreement reached" in negotiations, Mich. Comp. Laws § 423.215 (P.A. 93a-94a), or statutes covering state employees under which negotiated agreements and contract administration are directly subject to action by the legislature, *e.g.*, Minn. Stat. Ann. § 179A.22(4) (West Supp. 1990). The latter type of statute is another factor that distinguishes *Knight*, 571 F. Supp. at 3-4.

The panel majority and district court nonetheless considered lobbying and other political activities to obtain funding for education generally, or employment-related benefits not provided in the labor contract, as sufficiently "closely connected" to the duties of a bargaining agent representing educational employees to override the nonmembers' first-amendment rights. P.A. 7a-10a, 58a. That is untrue in fact and contrary to this Court's decisions.

The connection between state and federal funds and faculty salaries and benefits under the Ferris contract is only indirect and not even necessary. None of the state and federal monies Ferris receives are earmarked for salaries and benefits, which must be bargained with the Board of Control: state appropriations are general, and federal funds are either passed on as part of the state appropriations or are direct grants for particular programs. *See* J.A. 124-26.

Nor does any provision of the PERA impose a duty on an exclusive representative to advance employees' "interests in legislative and other 'political' arenas" outside its bargaining unit, as the panel majority erroneously assumed, P.A. 7a. *See* Mich. Comp. Laws §§ 423.201-.216; J.A. 24, 113-14; *see also Florey v. ALPA*, 439 F. Supp. 165, 169-70 (D. Minn. 1977) (a bargaining agent owes employees no duty to lobby an administrative agency on employment-related matters), *aff'd on other grounds*, 575 F.2d 673 (8th Cir. 1978). In those political arenas, the union acts as a voluntary association representing its members, not as a statutory bargaining agent speaking for all employees in the unit. As one MEA official described it, such lobbying is "typical of most common interest groups," and it was done by the NEA and its affiliates before public-sector bargaining became lawful. J.A. 47-48; 192-93 (J.A. 49-50).

The holding that the lobbying at issue here is sufficiently "closely connected" to employment relations to infringe on nonmembers' first-amendment rights is directly contrary to *Pickering v. Board of Education*, 391 U.S. 563 (1968). *Pickering* held that "the question whether a school system requires

additional funds" is not a matter of employer-employee relations, but a matter of public concern "in which the fact of employment *is only tangentially and insubstantially involved*." On such a question, "it is necessary to regard the teacher as the member of the general public he seeks to be," entitled to full first-amendment protection. *Id.* at 571-74 (emphasis added).[23]

The notion that the forum is irrelevant in determining the chargeability of lobbying, or other political activity, so long as its object impacts on the terms and conditions of employees represented by the union, *see* P.A. 7a, 52a, is contrary to *Madison Joint School District*. The Court there held that a nonunion teacher could not constitutionally be prohibited from speaking at a public school board meeting in opposition to an agency-shop proposal over which there was an impasse. The Court distinguished "true contract negotiations between a public body and its employees" from "participation in public discussion of public business." 429 U.S. at 175-76. Although the subject matter of the teacher's speech was an issue in bargaining, it also was "a debatable public question." *Id.* at 173-75 (citing *Pickering*, 391 U.S. at 568). Thus, the teacher had an "absolute right" to communicate his views on the agency-shop proposal either "when the board sits in public meetings to conduct public business and hear the views of citizens" or "to the public generally in pamphlets, letters, or expressions carried by the news media." *Id.* at 175-76 & n.10.

By the same token, the teacher in *Madison Joint School District* could not have been required to subsidize the union's

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[23] As noted *supra* pp. 25-26, many of the lobbying efforts of the unions here were for taxes, appropriations, and programs for K-12 education only, not even for higher education in general, much less Ferris in particular. Since K-12 and higher education are competitors for scarce public funds, the panel majority thus compels nonmembers to subsidize speech and petition on controversial matters of public concern that are not only against their interests as taxpayers, but also as faculty members. *See e.g.*, Samuelson, *Back-to-School Economics*, Newsweek, Sept. 23, 1985, at 53.

rebuttal of his views in either public forum. A nonmember may be required to subsidize his bargaining agent's conduct of negotiations with his employer on a term of employment, even if it has ideological implications. *Abood*, 431 U.S. at 222. However, he has an absolute right not to finance the union's lobbying of any governmental body when it "sits in public meetings to conduct public business and hear the views of citizens," or the union's communication of its "views to the public generally," on the same subject matter. In negotiating and administering labor contracts, a union is engaged in what Justice O'Connor has described as a "commercial" transaction. *Roberts*, 468 U.S. at 637-38 (concurring). But when it enters into legislative and other political arenas, it undertakes ideological activity that is not "an *integral* part *of the bargaining process*," *Abood*, 431 U.S. at 236 (emphasis added), even if the subject matter might impact on employees it represents for bargaining purposes.

As Justice Black said in *Street*, "[c]ompelling a man by law to pay his money to * * * advocate laws or doctrines he is against" violates the first amendment. It "makes no difference if, as is urged, political and legislative activities are helpful adjuncts of collective bargaining." 367 U.S. at 788-89 (dissenting on other grounds). State coerced financial support of such activity offends the first-amendment doubly. It harms both the individual's personal interest in free choice and society's interest in the free functioning of the political and legislative processes by increasing the clout of a special interest group on one side of some of the most controversial and fundamental public questions of our time, such as taxation, spending limits, allocation of public resources, educational philosophy, and the wisdom of authorizing public sector bargaining. *See First Nat'l Bank v. Bellotti*, 435 U.S. 765, 785-86, 790-92 (1978); *Elrod*, 427 U.S. at 355-57.[24]

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[24] The dangers to society from state-coerced financial support of political and ideological activities of private organizations are described in Comment, *The Right of Ideological Nonassociation*, 66 Cal. L. Rev. 767, 786-88 (1978).

C. BALLOT CAMPAIGNS AND OTHER POLITICS

In approving the FFA's expenditure for a PPE conference on the theory that the PPE program was only a "lobbying" program, the district court ignored the very testimony that it credited as having "best summed up" that program: " 'The "Preserve Public Education Program" was an attempt on the part of the [MEA] to develop meaningful coalitions in the various communities so that we could *pass millages, fight ballot issues*, and do the kind of things that are absolutely necessary to fund public education * * * .' " P.A. 31a (quoting J.A. 34) (emphasis added). In short, the program involved campaigns for and against ballot issues as well as lobbying. Indeed, the MEA's outline of the PPE program and descriptions of it in the *Teacher's Voice*, also ignored by the court, show that it included political training, organizing, and electioneering in support of candidates for public office. J.A. 157-83 (J.A. 52-54); 264-69 (J.A. 27-28); *see also, e.g.*, J.A. 126-28 (PPE "integrate[d] with the political process"); 184-85 (J.A. 54-55) (memo *re* PPE-Posters & Ads).

Moreover, uncontradicted evidence establishes that the specific expense at issue was not chargeable under any theory. The unions stipulated that the FFA's expenditure for a PPE conference "was for travel expenses to the MEA legislative/political action conference held on February 4 through 6, 1982, at Flint, Michigan." J.A. 109. A memorandum announcing that conference and reports on it in the *Teacher's Voice* show that one of its major purposes was to begin the process of screening and endorsing candidates for public office. J.A. 186-87 (J.A. 114, 116-17); 263-64, 269-70 (J.A. 27-28). And, the MEA's director of Government Affairs testified that "[e]verything that related to this conference was non-chargeable"! J.A. 114-16.

The second expenditure for election-related activity held chargeable by the district court was the cost of 847.5 of the 1,167 column inches in the *Teacher's Voice* categorized as "Electoral Politics." P.A. 63a, 80a. As the court found more column inches chargeable than the MEA did, the articles considered chargeable by the court must include all articles which the MEA's legal

director deemed chargeable (*i.e.*, did not mark "NC" in the content analysis). Those articles concern millage elections, a petition drive for a statewide ballot proposition on utility rates, the MEA's opposition to a proposition for property-tax relief, school-board member recall elections, a referendum on an agency shop, the MEA convention's actions on political action committee contributions and a nuclear-weapons-freeze ballot proposal, plans to back candidates for the legislature, and the reasons for involvement in political action. J.A. 217-26 (J.A. 24-26), & Pl.Ex. 612 (J.A. 27-28) as referenced therein (*e.g.*, J.A 278).

Millages are local taxes for the support of public schools adopted in referenda of tax-paying voters in individual school districts. J.A. 121. Union witnesses admitted that millage "is not a union management issue. It is a school community issue * * * " in which the unions were involved before they were permitted to bargain. J.A. 49, 97-98; *see Pickering*, 391 U.S. at 566, 571-72. Like lobbying and campaigning for candidates, advocacy concerning referenda on questions affecting the general public, such as taxes, "is at the heart of the First Amendment's protection," even if the speaker is a corporation or union and the ballot proposition would have "a material effect on its business or property." *Bellotti*, 435 U.S. at 776-86.

Thus, coerced financial support of the MEA's campaigns for and against ballot propositions, including millages, substantially adds to the burden on first-amendment rights inherent in the agency shop, even if an objecting nonmember is employed in a school district that depends on millages. No vital state interest supports that infringement, because the PERA imposes no duty on an exclusive representative to engage in ballot campaigns.

Taxation is not a "budgetary [or] appropriations" decision that "might be seen as an integral part of the bargaining process," *Abood*, 431 U.S. at 236 (dictum). Like the election of "pro-labor political candidates," *Ellis*, 466 U.S. at 453, who then make those decisions, taxation relates only indirectly and contingently to bargaining. Millages need not be spent on teachers' salaries and benefits. J.A. 122. The contingency is tertiary in the case of

state taxes: *if* the voters pass a proposition increasing taxes, and *if* the legislature appropriates that money for education instead of other services, and *if* the employer agrees in later negotiations, then salaries may increase. *See* J.A. 120, 124.

Moreover, as clear as it is that no ballot propositions are within the scope of the statutory duties owed by unions to any employees they represent, it is even clearer that millages have no relationship at all to bargaining at Ferris. For neither it nor any other four-year higher education institution in Michigan derives *any* funding from millages. J.A. 112, 122. That fact alone requires reversal of the holdings below that the nonmembers can be charged for costs of the PPE program and the articles in the *Teacher's Voice* reporting on millage campaigns.

The panel majority conceded that "the district court may have erred in permitting plaintiffs to be charged for a few" other articles in the *Teacher's Voice*, such as those "on ballot propositions involving utility rates and a nuclear weapons freeze."[25] The majority analogized those expenditures to the *de minimis* expenditures for union social activities held chargeable in *Ellis*, 466 U.S. at 449-50. P.A. 10a n.1. The analogy fails.

First-amendment interests were implicated by the purely social activities in *Ellis*, 466 U.S. at 456, only "from the union's involvement" in them.[26] However, the political advocacy at

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25 The concession was unavoidable as to those and other articles. The unions stipulated that advocacy of the utility-rate proposition was nonchargeable, and a union official testified that activity in school-board elections (and thus recalls) also was nonchargeable. J.A. 117. The nonchargeability of the advocacy of an agency shop in a referendum was required by *Madison Joint School District*; and, of support of legislative candidates and a nuclear freeze ballot issue, by *Abood*. *See Keller*, 110 S. Ct. at 2237.

26 It does not follow from *Ellis* that all union "social" activities are constitutionally chargeable. Some may have ideological purposes. *E.g.*, J.A. 270-71 (J.A. 27-28) (banquet at legislative-political action conference, and fund-raiser for Michigan Women's Hall of Fame).

issue here implicates significant first-amendment interests far beyond the union's role as advocate, as Judge Merritt recognized. *See* P.A. 15a-16a (dissenting). Therefore, the panel majority's holding is contrary to the explicit command of *Hudson*, 475 U.S. at 305, that "whatever the amount, the quality of [nonmembers'] interest in not being compelled to subsidize the propagation of political and ideological views that they oppose is clear." The first amendment does not permit government to "forc[e] an individual to contribute even 'three pence' for the 'propagation of opinions which he disbelieves.'" *Id.* at 305-06 & n.15 (quoting 2 *The Writings of James Madison* 186 (G. Hunt ed. 1901), & I. Brant, *James Madison: The Nationalist* 354 (1948)).

D. PUBLIC RELATIONS ACTIVITIES

The district court held that $832.96 spent by the FFA "for informational picketing, media exposure, signs, posters, and buttons" during negotiations with Ferris in the fall of 1981 was chargeable. P.A. 30a, 59a.[27] In addition, the cost of the entire portion of the *Teacher's Voice* categorized as "Public Relations" was considered chargeable. P.A. 63a, 80a. Those articles concern efforts to improve the public image of the unions or of teachers and education generally. J.A. 227-29 (J.A. 24-26), & Pl.Ex. 612 (J.A. 27-28) as referenced therein (*e.g.*, J.A. 266-67).

The court of appeals' majority conceded that the "public relations activities challenged * * * in this case may not be 'central' to collective bargaining." P.A. 12a. They cannot be analogized to the *de minimis* social activities held chargeable in *Ellis*, 466 U.S. at 449-50, because public relations activities directed at the general public clearly add significantly to the infringement of the agency shop on objectors' first amendment interests. By definition they are not part of the statutory process of "dealing with the employer on labor-management issues," *Ellis*,

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27 Of that total, $425.56 was not more specifically identified, and $407.40 was included in a stipulation that certain expenses were characterized by the FFA's records as related to a threatened strike. J.A. 109-10; *see infra* p. 40.

466 U.S. at 448, but constitute public discussion of matters of public interest, even when the subject is public-sector labor negotiations. *See Madison Joint School Dist.*, 429 U.S. at 175-76 & n.10; J.A. 48; 192-93 (J.A. 49-50).

In *Beck*, 776 F.2d at 1211 n.32, it was held that creating a favorable climate of public sympathy and support for a union is "not 'reasonably necessary . . . for the proper effectuation' of collective bargaining." The district court here argued that "attempts to bring public pressure to bear on the employer" are "very important during contract negotiations involving public sector labor unions * * * given the nature of the employment and the funding available." P.A. 30a. In fact, public pressure was not *rationally* significant to the FFA's negotiations, because Ferris derives funds from tuition and legislative appropriations, not the local community. *See* J.A 112. Image-making efforts, whether particular or general, at best have only the same "attenuated connection with collective bargaining" as organizing, and it is equally "perverse" to charge nonmembers costs of attempts to improve the public image of unions which they oppose. *See Ellis*, 466 U.S. at 451-52 & n.13.

E. PROFESSIONAL ACTIVITIES

All but 319.5 column inches of the 1,977 categorized as "Other Material" in the *Teacher's Voice* were held chargeable by the district court. P.A. 63a, 80a. The articles in that category have no direct relationship to collective bargaining. They are about teaching and education generally, professional development, unemployment, job opportunities, award programs of the MEA, and other miscellaneous matters. J.A. 236-50 (J.A. 24-26), & Pl.Ex. 612 (J.A. 27-28) as referenced therein (*e.g.*, J.A. 271-72).

Activities concerning teaching and education as a profession were conducted by teacher associations before public-sector bargaining became lawful. J.A. 47-48; 192-93 (J.A. 49-50). As a matter of Michigan law, such activities do not "in any way relate to the representation of members in collective bargaining." *Grand Rapids School Bd.*, 64 L.R.R.M. (BNA) 1268, 1268-69

(Mich. Lab. Med. Bd. 1966). Laid-off employees are no longer in a bargaining unit, J.A. 85, and the union's duties as exclusive representative do not include helping them obtain unemployment benefits or new jobs. *See, e.g., Karo v. San Diego Symphony Orchestra Ass'n*, 762 F.2d 819, 820-21 (9th Cir. 1985); *Lacy v. Auto Workers Local 287*, 102 L.R.R.M. (BNA) 2847, 2849-50 (S.D. Ind. 1979); *Marietta v. Cities Serv. Oil Co.*, 414 F. Supp. 1029, 1038 (D.N.J. 1976).

The panel majority conceded that these professional activities "may not be 'central' to collective bargaining." P.A. 12a. They, too, cannot be analogized to *de minimis* union social activities. Some of the unions' professional and educational programs are ideological in nature. Such things as curriculum and instructional methods are matters of public concern and, often, heated ideological controversy. *See Abood*, 431 U.S. at 256-57, 263 n.16 (Powell, J., concurring in the judgment). Moreover, even expression and association which can be described as social, economic, educational, cultural, charitable, or civic, rather than ideological, is worthy of full first-amendment protection. *Roberts*, 468 U.S. at 622, 626-27, 636; *Abood*, 431 U.S. at 231.[28] By the same token, objecting nonmembers cannot constitutionally be compelled to subsidize them. *See Beck*, 776 F.2d at 1211 (charitable expenditures not chargeable); *compare Street*, 367 U.S. at 777 n.3 (Douglas, J., concurring) *with Hanson*, 351 U.S. at 236 & n.8 (use of compulsory dues for "union insurance and death benefit plans" is not permitted by the first amendment).

F. PARTICIPATION IN AFFILIATES' MEETINGS

The district court ruled that the nonmembers could be charged for expenses of the FFA in sending delegates to conventions ("Representative Assemblies") of the MEA and NEA and participating in the 13E Coordinating Council. P.A. 57a-58a. In

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[28] In computing chargeable expenditures, the MEA conceded that its awards programs, reported on in some of the *Teacher's Voice* articles in this category, were nonchargeable. J.A. 21.

addition, it upheld the chargeability of expenses of the MEA in conducting its conventions and sending delegates to the NEA's. P.A. 62a-63a. Both lower courts considered it dispositive here that the national union's convention was held chargeable in *Ellis*. P.A. 5a-6a, 57a-58a. However, union activity which might normally be chargeable cannot be if "used as a cover for forcing ideological conformity." *Hanson*, 351 U.S. at 238.

The convention in *Ellis*, 466 U.S. at 448-49, met only once in four years to maintain the exclusive representative's "corporate or associational existence," "elect officers to manage and carry on its affairs," and "establish bargaining goals and priorities."[29] In addition, the costs of political activities that occurred at it apparently were "'deducted from [the dues of] objecting employees.'" *Id.* at 459 n.1 (Powell, J., dissenting in part) (quoting Brief for Respondents at 29 n.16, *Ellis* (No. 82-1150)).

It is a far cry from such a quadrennial business convention of the bargaining agent itself, *see supra* note 13, with only an incidental political component, to *three* conventions and several other meetings held *every* year by *affiliates* of the agent for *primarily* political and ideological purposes. The NEA, MEA, and 13E Coordinating Council are not the exclusive representative at Ferris. J.A. 23; 291 (J.A. 18-19). The fact that the Michigan Employment Relations Commission held that "the 'union as affiliated is the exclusive representative'" under the PERA, P.A. 6a, 58a (quoting *Bridgeport Spaulding Community Schools*, No. C79-J-353, slip op. at 40 (A.L.J. Feb. 24, 1986)), merely means that expenditures of the affiliates can be charged to dissenters if, *and only if*, it is proven that they were used for agreement-related purposes. *See Hudson*, 475 U.S. at 307 n.18; *Ellis*, 466 U.S. at 457 n.15. That burden of proof was not met as to the conventions of the MEA and NEA and activities of the 13E Coordinating Council.

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[29] The convention in *Ellis* not only set bargaining goals and priorities in pending negotiations, it ratified agreements. Brief for Respondents at 28-29, *Ellis* (No. 82-1150).

In 1981-82, the MEA held two conventions. The Fall Representative Assembly ("RA") adopted a platform, resolutions, and "Goals and Objectives." The Spring RA adopted a budget, amended the MEA's constitution and elected two members of the NEA board of directors. Officers of the MEA itself were not elected at either RA. The reports on those conventions in the *Teacher's Voice*, and the "Goals and Objectives" adopted at the Fall RA, show that much of the activity at them was political and ideological, and that they had little to do with bargaining anywhere and even less in higher education. *See* J.A. 141-54 (J.A. 51-52); 258-63, 275-83 (J.A. 27-28); *see also* J.A. 57 (the keynote address at the Fall 1981 RA was entitled "The Myths of the Arms Race").

The NEA's RA was even more remote from bargaining at Ferris. The goals of the MEA delegation to that convention included pursuit of the enactment of several federal legislative measures, including the Equal Rights Amendment, and support for the NEA's political action committee; *none* concerned bargaining. J.A. 154-56 (J.A. 58-59). That emphasis is not surprising, given that, as described in the *Teacher's Voice*, the main purpose of the NEA's convention was to generate and organize political and legislative opposition to the Reagan Administration and its programs. J.A. 283-89 (J.A. 27-28); *see also* Pl.Ex. 612 (J.A. 27-28), *Assault on Public Education a Major Concern*, Teacher's Voice, June 14, 1982, at 4, col. 1 (the NEA RA's theme was "Political Power for Educational Excellence").

The court of appeals accepted the district court's finding that the 13E Coordinating Council "developed bargaining strategies and representational policies for bargaining units, including Ferris State College." P.A. 6a, 58a. That finding conflicts with the only contemporaneous evidence of the Council's activities in 1981-82, which were primarily promoting lobbying for funding of education and encouraging contributions to the MEA and NEA political action committees. J.A. 131 (J.A. 59-60); 138-39 (J.A. 60); 140 (J.A. 61); *see* J.A. 60-61, 90; *see also* J.A. 47; 188-90 (J.A. 114, 116-17) (coordinating councils had political action committees).

G. PREPARATIONS FOR ILLEGAL STRIKES

Strikes by public employees are prohibited by the PERA. Mich. Comp. Laws § 423.202 (P.A. 92a); *see Abood*, 431 U.S. at 229. As a matter of Michigan law, compulsory service fees cannot include monies allocated to supporting public-sector strikes. *Male v. Grand Rapids Educ. Ass'n*, 98 Mich. App. 742, 295 N.W.2d 918 (1980), *appeal denied*, 412 Mich. 851 (1981). Although the district court followed *Male* to hold that a no-interest loan to support another local's strike was not chargeable, P.A. 59a-60a, it and the court of appeals' majority held that expenses of the FFA in preparing for and threatening an illegal strike were chargeable, because the union did not actually strike. P.A. 11a-12a, 59a.

The parties stipulated that "preparations for a possible strike were made in the fall of 1981 by the [FFA]"; that expenses totaling $4218.44, spent on a crisis center/strike headquarters, newspaper advertising, and signs, posters and buttons, were "variously characterized in the [FFA]'s records as 'strike' expenditures, 'job action' expenditures, and 'cris[i]s' expenditures",[30] and that $75.00 was spent for rent for a membership meeting "for the purpose of voting whether to accept the college's contract offer or support a strike." J.A. 109-10; *see* P.A. 78a-79a.[31]

The district court credited the testimony of a former MEA department head, employed at the time of trial by another part

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[30] The "term 'job action' is synonomous [*sic*] with 'strike'." P.A. 29a. The "purpose for which [a crisis center is] created and named" is, "if we ever have to have a strike, * * * to have a place for work to go on." J.A. 47.

[31] Half of the $75.00 in rent for that meeting should be considered strike-related, for a total of $4255.95 for strike preparations (the balance spent by the FFA on rent for membership meetings is not disputed). The $4804.00 in expenses related to "negotiations difficulties" held chargeable by the district court, P.A. 59a, included $4218.44 for strike preparations, $150.00 for meeting rent, and $425.56 in public relations activities not included in the stipulation concerning strike preparations, *see supra* p. 35 & note 27.

of the MEA organization, that the strike preparations were only a bargaining ploy to put pressure on Ferris. P.A. 29a-30a.[32] That self-serving testimony should have been disregarded, because it was contradicted by contemporaneous union records. *See Toledo Scale Corp. v. Westinghouse Elec. Corp.*, 351 F.2d 173, 179 (6th Cir. 1965); *Broadcast Music, Inc. v. Havana Madrid Restaurant Corp.*, 175 F.2d 77, 80-81 (2d Cir. 1949). Private communications among officials of the MEA and FFA in evidence show that the leaders of the FFA prepared and intended to strike, that a majority of its members voted to strike, and that a strike did not occur only because a majority vote of all faculty, not just members, was required by the FFA's bylaws. J.A. 132-35 (J.A. 63); 136-37 (J.A. 110); 290 (J.A. 88-89).[33]

In any event, nonmembers cannot constitutionally be compelled to finance threats to engage in an illegal activity, even as a pressure tactic in bargaining. As *Ellis*, 466 U.S. at 451, held, "[i]f the union cannot spend dissenters' funds for a particular activity, it has no justification for spending their funds for writing [or talking] about that activity." Judge Merritt correctly analyzed the implications of the decision below on this point: "If the strike had gone forward and the house of the college president had been put to the torch, obviously the dissenters could not be charged with the gasoline for the fire. Likewise, dissenters should not be forced to pay the expenses for planning unlawful acts." P.A. 16a (dissenting).

The Court can take judicial notice that illegal, even violent and criminal, acts sometimes occur, and more often are threat-

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[32] *See* J.A. 33-34, 61-63, for the witness' long history of employment by the MEA. His bias also is shown by his admission that he believed "that all MEA activities are really related to collective bargaining." J.A. 50-51.

[33] The FFA's President wrote to the MEA's President: "our intention is to take back to the membership the last drop we have been able to squeeze ou[t] of the College. Then we will send the mediator packing, set up one more bargaining date and call a strike next Tuesday." J.A. 136-37.

ened, in labor relations. *See, e.g.*, A. Thieblot & T. Haggard, *Union Violence: The Record and the Response by Courts, Legislatures, and the NLRB* (Labor Relations & Public Policy Series No. 25, 1983). However, that illegal acts are commonly planned and threatened as "bargaining tools" in legal negotiations gives government no compelling interest in requiring nonmembers to subsidize such conspiracies and extortionate speech. The state's only interest is in preventing subsidization, not in sanctioning it and thus encouraging the illegal activity. *See Male*, 98 Mich. App. at 750, 295 N.W.2d at 920. Therefore, to "permit a * * * union to force dissenters to finance [threats and preparation for] unlawful acts * * * is no small First Amendment violation." P.A. 16a-17a (Merritt, J., dissenting).

CONCLUSION

For the foregoing reasons, the judgment should be reversed to the extent that it entitles the unions to service fees for 1981-82 from petitioners for the disputed activities. All expenditures of the MEA and NEA that the court of appeals held chargeable fall into one or more of those categories. The only constitutionally chargeable costs that the district court identified are $4788.77 spent by the FFA for bargaining, contract ratification, a negotiations training workshop, and arbitration fees and $112.50 for its membership meetings. P.A. 57a; *supra* note 31. They constitute 34.9% of the FFA's total direct costs of $14,038.71; 34.9% of its administrative costs is $1500.18, giving total chargeable expenses of $6401.45. *See* P.A. 28a-29a, 78a-79a.

Dividing that total by the number of employees in the bargaining unit in 1981-82 (502), each employee's proportional share of proven chargeable costs is $12.75, not the $28.59 awarded by the district court, P.A. 78a. Thus, the Court should

reverse and remand with instructions to modify the judgment to provide that the FFA is entitled only to $12.75 from each of the five petitioners named in it in satisfaction of their service fee obligations for 1981-82, with any interest accrued on that amount in the escrow account, and that the balance in escrow be returned to those petitioners.

Respectfully submitted,

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JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

JAMES P. LEHNERT, *et al.*,
Petitioners,

v.

THE FERRIS FACULTY
ASSOCIATION-MEA-NEA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

JOINT APPENDIX, VOLUME I

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(continued over)

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CERTIORARI GRANTED JUNE 11, 1990

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In the United States District Court for the Western District of Michigan, Case No. G78-346-CA1

Docket No.	Date	Proceedings
1	May 22, 1978	Filed complaint
46	Apr 25, 1979	Filed Plaintiffs' Amended Complaint
78	Feb 9, 1981	Filed Opinion
79	Feb 9, 1981	Filed ORDER denying plaintiff's motion for SJ and denying defendant's motion to dismiss or for SJ
107	Aug 11, 1982	Filed OPINION
108	Aug 11, 1982	Filed ORDER in accordance w/ opinion that Deft's Unions' Motion to Dismiss or for summary judgment is denied, that pltfs' cross-Motion for partial summary judgment is denied, and deft Unions' Motion for abstention is denied
117	Feb 23, 1983	Filed Defts' Ferris Faculty Assoc. MEA-NEA, Mi Education Assoc., and Nat'l Education Assoc.'s, ANSWER to Amended Complaint

Docket No.	Date	Proceedings
120	Mar 1, 1983	Filed ANSWER of Deft Board of Control of Ferris State College to Pltf's Amended Complaint
146	Jan 15, 1985	Filed final PRETRIAL ORDER
147	Jan 23, 1985	Filed letter from LaJeunesse regarding correction of Pre-Trial Order
149	Feb 4, 1985	Filed deft Unions' Proposed Findings of Fact and Conclusions of Law
151	Feb 4, 1985	Filed deft Unions' Trial Brief
154	Feb 5, 1985	Filed pltfs' Suggested Findings of Fact and Conclusions of Law
155	Feb 5, 1985	Filed pltfs' Suggested Additional Findings of Fact and Conclusions of Law Regarding deft NEA
156	Feb 5, 1985	Filed pltfs' Trial Brief
162	May 20, 1985	Filed letter from LaJeunesse dated 5/17/85 w/attached Pretrial Order pages 7 & 11 and pltfs' Trial Brief page 17 to be inserted in previously filed pleadings

Docket No.	Date	Proceedings
163	Dec 19, 1985	Filed pltfs' Supplement to Trial Brief
	Jan 7, 1986	Bench Trial (1)
	Jan 8, 1986	Bench Trial (2)
	Jan 9, 1986	Bench Trial (3)
	Jan 10, 1986	Bench Trial (4)
	Jan 13, 1986	Bench Trial (5)
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	Jan 16, 1986	Bench Trial (8)
	Jan 17, 1986	Bench Trial (9)
	Apr 23, 1986	Bench Trial Reconvened (10)
	Apr 24, 1986	Bench Trial continued (11)
	Apr 25, 1986	Bench Trial Continued (12) Trial ended this date
176	May 30, 1986	Filed deft Unions' Post-Trial Brief
178	May 30, 1986	Filed pltfs' Post-Trial Brief
179	Jun 6, 1986	Filed pltfs' Post-Trial Reply Brief
180	Jun 6, 1986	Filed defts' Post Trial Reply Brief
185	Aug 25, 1986	Filed OPINION
186	Aug 25, 1986	Filed JUDGMENT ORDER in accordance w/Opinion

Docket No.	Date	Proceedings
187	Sep 4, 1986	Filed MOTION by defts Ferris Faculty Assoc., MEA & NEA for Partial New Trial and to Alter or Amend Judgment
193	Jun 17, 1987	OPINION (6 pages)
194	Jun 17, 1987	JUDGMENT ORDER in accordance w/Opinion that defts' Motion for Partial New Trial and To Alter or Amend Judgment is denied.
195	Jul 9, 1987	NOTICE OF APPEAL by defts
196	Jul 23, 1987	NOTICE OF CROSS-APPEAL by pltfs

In the United States Court of Appeals for the Sixth Circuit, Case No. 87-1700

Docket No.	Date	Proceedings
1	07/22/87	NOTICE OF APPEAL, filed [87-1668]
3	07/29/87	NOTICE OF CROSS APPEAL, filed [87-1700]
19	12/10/87	STIPULATION: Rule 42(b), voluntary dismissal [87-1668]

Docket No.	Date	Proceedings
20	12/16/87	ORDER: appeal dismissed-Rule 42(b), Rule 8(b) [87-1668]
	02/03/88	BRIEF/APPELLANT
33	6/6/88	BRIEF/APPELLEE
	06/24/88	REPLY BRIEF/APPELLANT
	06/28/88	JOINT APPENDIX (5) in 5 vols.
	10/20/88	CAUSE ARGUED
44	08/14/89	OPINION: affirmed
	08/14/89	JUDGMENT
46	08/29/89	PETITION FOR REHEARING EN BANC by appellant
47	08/30/89	MOTION/APPELLANT: for extension of time to file petition for rehearing en banc
48	09/19/89	ORDER: motion of appellants for leave to file petition for rehearing one day out of time granted
51	10/16/89	RESPONSE/APPELLEE: to #46

Docket No.	Date	Proceedings
52	11/07/89	ORDER: petition for re-hearing en banc denied

AMENDED COMPLAINT
[R.46, filed Apr. 25, 1979]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

James P. Lehnert; Elmer S. Junker; James E. Lindsey; Sam C. Peticolas; John R. Schauble; Theodore D. Speerman,

Plaintiffs,

v.

The Ferris Faculty Association - MEA-NEA; Michigan Education Association; National Education Association of the United States; The Board of Control of Ferris State College; S. Eugene Bychinsky; Robert L. Ewigleben; Earl D. Gabriel; Robert P. Gerholz; Fran Harris; Delbert D. Long; Robert C. Redman; Thomas P. Scholler; Patricia M. Short; Steven L. Thomas,

Defendants.

Civil Action
No. G78346CA(1)

AMENDED COMPLAINT

I. Jurisdiction

1. This court has jurisdiction over the claims for relief stated herein by virtue of 28 U.S.C. § 1343 and 28 U.S.C. § 1331 in that:

a. the claims for relief arise under laws of the United States providing for the protection of civil rights, to wit: 42 U.S.C. §§ 1983, 1985, 1986; and

b. the claims for relief arise under the Constitution and the laws of the United States, to wit: Article I, Section 10, clause 1, and the first and fourteenth amendments and the amount in controversy, as to each plaintiff, exceeds $10,000, exclusive of interest and costs.

II. Parties

2. Plaintiffs are residents of the United States and the State of Michigan. Plaintiffs James P. Lehnert, Elmer S. Junker, James E. Lindsey, Sam C. Peticolas, and John R. Schauble are tenured members of the faculty of Ferris State College (Ferris State), a state supported institution of higher learning. Plaintiff Theodore D. Speerman retired from that faculty effective November 22, 1978.

3. Defendant Ferris Faculty Association (FFA) is a labor organization having as its membership certain members of the faculty of Ferris State. The FFA is an unincorporated association and maintains its principal place of business at 220 1/2 S. Michigan Avenue, Big Rapids, Michigan 49307. Under color of law, to wit: Mich. Comp. Laws § 423.211, the FFA is the exclusive representative of the faculty of Ferris State for the purpose of bargaining collectively with the Board of Control of Ferris State College (Board of Control).

4. Defendant Michigan Education Association (MEA) is a labor organization affiliated with the FFA and the National Education Association (NEA). The MEA is an unincorporated association and maintains its principal place of business at 1216 Kendale Boulevard, East Lansing, Michigan 48823.

5. Defendant NEA is a labor organization affiliated with the FFA and the MEA. The NEA is a body corporate and maintains its principal place of business at 1201 16th St., N.W., Washington, D. C. 20036.

6. Defendant Board of Control is a body corporate established by the laws of Michigan, to wit: Mich. Comp. Laws § 390.802, and is empowered to control and manage Ferris State. The members of the Board of Control are appointed by the Governor by and with the advice and consent of the Senate.

7. Defendants Earl D. Gabriel, 26880 Constance Avenue, Dearborn Heights, Michigan 48127; Robert P. Gerholz, 1704 Crescent Drive, Flint, Michigan 48503; Fran Harris, 8120 East Jefferson, Detroit, Michigan 48214; Delbert D. Long, 412 Ives Avenue, Big Rapids, Michigan 49307; Robert C. Redman, P. O. Box 417, Lake City, Michigan 49651; Thomas P. Scholler, 1423 Buckingham, Birmingham, Michigan 48008; Patricia M. Short, 1972 Trinity Lane, Jackson, Michigan 49201; and Steven L. Thomas, 3904 Raleigh, Okemos, Michigan 48864, are members of the Board of Control, and reside at the indicated addresses. These defendants are sued in both their individual and official capacities.

8. Defendant Robert L. Ewigleben is the President and chief executive officer of Ferris State, and is sued in both his official and individual capacities.

9. Defendant S. Eugene Bychinsky is Vice President, Personnel of Ferris State College, and is sued in both his official and individual capacities.

III. Claims for Relief

First Claim for Relief

10. Pursuant to Mich. Comp. Laws § 423.210, since April 25, 1974 successive collective bargaining agreements between the Board of Control and FFA have contained an agency shop agreement requiring plaintiffs and other faculty members to pay to the FFA, as a condition of employment, a service fee in an amount equivalent to the dues uniformly required of FFA members. Pursuant to these agency shop agreements, Ferris State was obliged to terminate faculty members who refused to pay such fees. The terms of the agency shop agreement remained the same in all essential respects until June 30, 1978, when the 1975-78 collective bargaining agreement expired. A true and accurate copy of the 1975-78 agency shop agreement between the FFA and the Board of Control is annexed hereto as Exhibit A.

11. On March 10, 1979, the Board of Control approved the collective bargaining agreement currently in effect. The current agreement requires those plaintiffs still on the Faculty at Ferris State and other faculty members to pay to the FFA as a condition of employment a service fee equivalent to union dues less any amounts not permitted by law. The current agreement further provides that if a faculty members fails to pay the service fee, the FFA shall certify to Ferris State that the amount of the service fee includes only those items authorized by law, and Ferris State shall automatically deduct the service fee from the faculty members' pay and transmit the money to the FFA. The deduction may be made without the faculty members' authorization and the agreement does not require a hearing of any kind prior to the deduction. A true and accurate copy of the current agency shop agreement is attached hereto as Exhibit B. (This agreement will sometimes hereinafter be referred to as the "current agreement" and preceding agreements will be referred to as the "previous agreements".)

12. The automatic deduction described in paragraph 11 is authorized by the laws of Michigan, to wit: Public Act 390, L. 1978. In pertinent part, Public Act 390 provides:

> With the exception of those deductions required or expressly permitted by law or by a collective bargaining agreement, an employer shall not deduct from the wages of an employee, directly or indirectly, any amount without the full, free, and written consent of the employee, obtained without intimidation or fear of discharge for refusal to permit the deduction.

13. Defendants have enforced the previous agency shop agreements against plaintiffs thereby compelling plaintiffs to pay to the FFA an amount equivalent to FFA membership dues as a condition of their continued employment at Ferris State. Unless enjoined, defendants will enforce the current agreement.

14. Plaintiffs have notified, and by this complaint do again notify, defendants of their objection to the use, even temporarily, of any portion of their service fees exacted pursuant to the agency shop agreements for purposes other than bargaining collectively with the Board of Control, administering the contract with the Board of Control, and adjusting grievances arising thereunder.

15. Pursuant to and in furtherance of various agreements among defendants FFA, MEA, and NEA, a substantial portion of the service fees collected from plaintiffs pursuant to the agency shop agreement have been and will continue to be transmitted by defendant FFA to its affiliates MEA and NEA. Defendants FFA, MEA, and NEA have spent and will continue to spend substantial portions of the service fees exacted from plaintiffs to support activities other than collective bargaining with the Board of Control, administering the contract with the Board of Control, and adjusting grievances arising thereunder, including, but not limited to, the following:

(a) to support by direct and indirect financial expenditures and other contributions the political campaigns of candidates for public office including candidates for federal, state, and local offices;

(b) to support directly and indirectly public relations and lobbying by various individuals, groups, associations, and organizations intended: (1) to influence the general public to vote; (2) to influence legislative bodies to enact statutes, laws, or regulations; (3) to influence executive or administrative officials to exercise their authority to the legal, economic, or other special advantage of the FFA, MEA, and NEA, their allies, individual members, and adherents; or (4) otherwise to advance particular philosophical, scientific, or political, economic and social doctrines, ideologies, or programs;

(c) to propagate political and economic doctrines, concepts, ideologies, and legislative programs which are opposed by plaintiffs, thereby imposing upon them conformity to these doctrines, concepts, ideologies, and programs;

(d) to support meetings, conventions, and other activities exclusively limited to officers, agents, employees, and formal members of defendant FFA and affiliated labor organizations wherein (1) are introduced, debated, adopted, modified, or repealed organizational rules, regulations, policies, platforms, and programs to determine the actions of or otherwise control or influence defendant FFA and affiliated labor organizations; and (2) officers, agents, representatives, and others are selected by vote, appointment, or otherwise, to determine, administer, and enforce said rules, regulations, policies, platforms, and programs;

(e) to support strikes, walkouts, slow downs, boycotts, and other activity against public employers in the State of Michigan and elsewhere to the economic, professional and other detriment of plaintiffs;

(f) to cover the costs of publications, convention expenses, strike expenses and benefits, lobbying activities,

contributions to organizations and individuals, recreational, educational, economic, social, and other activities and various other programs unrelated to collective bargaining;

(g) to make available for the aforementioned activities and purposes (1) material supplies of said defendants; and (2) the services of the officers, agents, employees, and formal members of said defendants; and

(h) to take other action burdensome, vexatious, and costly to plaintiffs.

16. As applied, Mich. Comp. Laws § 423.210, and the agency shop agreements between the FFA and the Board of Control, on its face and as applied, permit defendants FFA, MEA, and NEA to use, at least temporarily, the service fees exacted from plaintiffs for purposes other than bargaining collectively with the Board of Control, administering that agreement, and adjusting grievances arising thereunder.

17. As applied, Mich. Comp. Laws § 423.210, and the agency shop agreements between the FFA and the Board of Control, on its face and as applied, are unconstitutional in that:

(a) they create a chilling effect upon plaintiffs' exercise of their freedoms of speech, thought, conscience, assembly, petition, and association guaranteed by the first and fourteenth amendments to the Constitution of the United States.

(b) they work a prior restraint upon plaintiffs' freedoms of speech, thought, conscience, assembly, petition, and association in violation of the first and fourteenth amendments to the Constitution of the United States.

[¶¶ 18-24 omitted in printing as not relevant to the issues being briefed]

Basis For Relief

25. As a result of the defendants' unlawful actions described in the foregoing claims for relief, plaintiffs have suffered monetary damages in the amount of the service fees that they have been required to pay to defendant FFA. Plaintiffs have also suffered, and will continue to suffer, irreparable injury unless equitable relief is granted restraining and enjoining the violations described in the foregoing claims for relief. Plaintiffs have no adequate remedy at law.

Prayer For Relief

Wherefore, plaintiffs pray that this Court take jurisdiction of this cause and issue relief as follows:

1. A judgment based upon the actual, current, and bona fide controversy between the parties as to the legal relations among them, pursuant to 28 U.S.C. § 2201 and Fed. R. Civ. P. 57, declaring:

a. that Mich. Comp. Laws § 423.210, as applied, and the agency shop agreements between the FFA and the Board of Control, on their face and as applied, unconstitutionally abridge plaintiffs' rights under the first and fourteenth amendments to the Constitution of the United States;

[sub-¶¶ b & c omitted in printing]

2. Injunctive relief permanently enjoining and restraining defendants from:

a. enforcing the current agency shop agreement between the FFA and the Board of Control against plaintiffs; and

b. depriving plaintiffs of their liberty or property without due process of law.

3. Award plaintiffs monetary damages in the amount of the service fees unlawfully exacted from them.

4. Award plaintiffs exemplary damages sufficient to deter future violations of plaintiffs' rights.

5. Award plaintiffs a reasonable attorney's fee pursuant to 42 U.S.C. § 1988.

6. Award such other and further relief as the Court deems just and appropriate.

[Signature block, Exhibits A-C, &
proof of service omitted in printing]

DEFENDANT UNIONS' ANSWER TO AMENDED COMPLAINT
[R.117, filed Feb. 23, 1983]

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Title omitted in printing]

NOW COME Defendants Ferris Faculty Association-MEA-NEA, Michigan Education Association, and National Education Association, by their attorneys, Foster, Swift, Collins & Coey, P.C., and for their answer to the amended complaint say as follows:

I. Jurisdiction

1. These Defendants admit that this Court has concurrent jurisdiction with Michigan courts and the Michigan Employment Relations Commission and that:

a. Plaintiffs have asserted that they are entitled to relief under the federal civil rights statutes alleged, and

b. These Defendants admit that Plaintiffs claim to be entitled to relief under the Constitution and laws of the United States, but these Defendants deny as untrue the allegation that the amount in controversy as to each Plaintiff exceeds $10,000.00, exclusive of interest and costs.

II. Parties

2. Admitted on information and belief.

3. Admitted (except as to the incorrect address and the incorrect allegation that the FFA is an unincorporated association) so long as it is understood that by "FFA" Plaintiffs are referring to FFA-MEA-NEA.

4. These Defendants admit the allegations contained in paragraph 4 except the untrue allegation that MEA is an unincorporated association, as to which these Defendants aver that the MEA is a nonprofit corporation.

5. Admitted.

6. These Defendants make no answer to the allegations contained in paragraph 6 inasmuch as they pertain to other Defendants.

7. These Defendants make no answer to the allegations contained in paragraph 7 inasmuch as they pertain to other Defendants.

8. These Defendants make no answer to the allegations contained in paragraph 8 inasmuch as they pertain to other Defendants.

9. These Defendants make no answer to the allegations contained in paragraph 9 inasmuch as they pertain to other Defendants.

III. Claims for Relief

10. These Defendants admit the substance of the allegations contained in paragraph 10 but allege that the collective bargaining agreements speak for themselves and are the best evidence of their content.

11. These Defendants admit the substance of the allegations contained in paragraph 11 but allege that the collective bargaining agreements speak for themselves and are the best evidence of their content.

12. Admitted.

13. These Defendants admit the allegations contained in paragraph 13 and in further answer to said paragraph these Defendants allege that they have enforced the current agreement in accordance with Abood v Detroit Board of Education, 431 U.S. 209, 52 L. Ed. 2d 261, 97 S. Ct. 1782.

14. Admitted.

15. These Defendants admit the allegations contained in the first sentence of paragraph 15 so long as it is understood that by FFA Plaintiffs are referring to the Ferris Faculty Association-MEA-NEA, the exclusive bargaining representative for the faculty at Ferris State College. Defendant Ferris Faculty Association-MEA-NEA denies as untrue the allegations pertaining to it contained in the second sentence of paragraph 15, including subparagraphs (a) through (h). In further answer to said paragraph Defendants MEA and NEA admit that they have spent some portions of the service fees exacted from Plaintiffs to support activities other than collective bargaining with the Board of Control of Ferris State College, administering the contract with that Board of Control, and adjusting grievances arising

thereunder (a concept different from whether such expenditures are related to collective bargaining, contract administration or grievance adjustment) including some of the expenditures referred to in subparagraphs (a), (b), (d), and (g). These Defendants also admit that the MEA and NEA have spent some portions of the service fees exacted from Plaintiffs in support of political activities but these Defendants deny that in doing so they have imposed upon Plaintiffs conformity to any political issues or candidates. In further answer to said paragraph these Defendants admit that the MEA and the NEA have on occasion spent a portion of the service fees exacted from Plaintiffs to support expenditures of the type generally referred to in subparagraph (e), but these Defendants deny that same has been to the economic, professional and other detriment of Plaintiffs. In further answer to said paragraph these Defendants admit that the MEA and the NEA have spent some portions of the service fees exacted from Plaintiffs to cover some of the items described in subparagraph (f), but these Defendants allege that they have made available to Plaintiffs a remedy, consistent with Abood, supra, for the rebate of any portion of the service fee spent on political or ideological activity unrelated to collective bargaining, contract administration grievance adjustment or employee representation, and these Defendants further deny that they have taken action burdensome, vexatious and costly to Plaintiffs.

16. Admitted on information and belief for several reasons, including that Plaintiffs' vexatious attack on the agency shop provisions in the collective bargaining agreements at Ferris State College has resulted in costs to the union Defendants far in excess of the amount of service fees exacted from Plaintiffs.

17. Denied as untrue.

[¶¶ 18-24 omitted in printing]

25. Denied as untrue.

WHEREFORE, these Defendants request that the complaint be dismissed and that they be awarded their costs and reasonable attorney fees.

[Signature block & proof of service
omitted in printing]

TRIAL TRANSCRIPT, VOL. I,
TESTIMONY OF PETER McNENLY
Jan. 7-8, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

[Title omitted in printing]

* * * *

[5]Q. Would you state your address and employment for the record, please?
A. I reside at 2503 Carey, Lansing, Michigan, and I am employed by the Michigan Education Association.

Q. In what capacity?
A. I am director of Legal Services.

* * * *

[16] [MR. SCHMEDLEN:] * * * If you would just identify what Exhibit No. "I" is, Mr. McNenly?

THE WITNESS: This is the collective bargaining agreement between Ferris State College and the Ferris Faculty Association, covering the period of 1981 to 1984.

* * * *

[28] MR. SCHMEDLEN: Your Honor, I would also offer "I" and "A" that I had previously identified that I don't think there is any objection to.

MR. LAJEUNESSE: I think that is --

THE COURT: "I" and "J."

[29] MR. SCHMEDLEN: "I" and "J." I am sorry.

THE COURT: Is there an objection?

MR. LAJEUNESSE: No objection.

THE COURT: "I" and "J" are received.

* * * *

[34]Q. Now that footnote deals with "Teacher's Voice." What is the "Teacher's Voice"?
A. That is the general publication of the Michigan Education Association. It is an internal newspaper.

* * * *

[35]Q. Could you tell me what, could you tell me what process you utilized in arriving at the non-chargeable figure that appears at footnote seven?
A. Well, we examined a content analysis that was previously done by either the representative of plaintiffs or the charging party in the Bridge Port-Spalding case, and we worked off of that in making our calculations.

Q. Very briefly, why did you use --

MR. LAJEUNESSE: Excuse me, Your Honor.

MR. SCHMEDLEN: --did you use that document?

MR. LAJEUNESSE: If I may make a general objection. The witness has a number of times used an undefined term. He keeps saying we and our, and it is not clear to me, and I don't believe it is clear to the Court.

THE COURT: There is some merit to that objection. What do you mean when you say we? You said we in the last instance about the reaction to the plaintiffs with regard to the paper.

THE WITNESS: I took a copy of the content analysis and went through and examined it. And it was from my examination and of that document that I was able to derive a figure that appeared in this footnote.

THE COURT: So you did it?

THE WITNESS: Yes.

[36] THE COURT: "We" in that case was Papal, one?

THE WITNESS: Yes.

BY MR. SCHMEDLEN:
Q. Did you actually review the "Teacher's Voice" editions that were published that year?
A. Yes, I sat down with the content analysis and our copies of the "Voice" and went through the documents.

THE COURT: The content analysis as I understood it was done by the plaintiffs or representatives of the plaintiffs?

THE WITNESS: Right.

THE COURT: And the content analysis had to do with what exactly?

THE WITNESS: We measured column inches. And it had a number of categories in it. And then it placed within each

category all of the stories or issue -- all of the stories that were in the "Voice" along with the number of column inches for each story, and then totalled up, first of all, in subtotal fashion I believe how many column inches were devoted to these various categories that were contained in this study --

THE COURT: I see.

THE WITNESS: And that is the document that I worked off of.

BY MR. SCHMEDLEN:
[37]Q. By way of summary, was the content analysis used by you for any other than mathematical purposes?
A. No, the math work had already been done in the study, and rather than reinvent the wheel I checked, spot-checked the figures, and they appeared to be correct. So that the measurements of column inches for the various stories as far as I could determine was accurate.

* * * *

[39]Q. I am moving now to the footnote nine which addresses awards and recognition.. Can you tell me why that was determined on this reduced fee sheet to be a non-chargeable or an arguably non-chargeable activity?
A. This particular item relates back to our first, or I should say, our earlier, relatively early rebate calculations. And because some of the criteria for the granting of the [40] awards did not seem to be related necessarily to compliance with MEA goals and objectives, I decided that this was one item that would be arguably non-chargeable.

Q. Is it your position that these awards and other matters in that program are in fact political or ideological and also unrelated to collective bargaining?
A. Well, I think you can make some arguments both ways on that. This is an example of one that we just decided to concede on.

* * * *

[75]Q. Mr. McNenly, in your role as director of Legal Services have you had occasion to review the motion in limine and then the renewed motion in limine filed by the plaintiffs in this case?
A. Yes, I have.

Q. In that context can you tell me whether you used the term, quote, "cost pool," unquote, in any fashion?
A. I have seen that or that phrase used.

Q. How is that phrase used in connection with this motion in limine concept that is raised by the plaintiffs?
A. Well, as I understand the purpose of the motion was to exclude evidence on expenditures that were not directly [76]related to or that we could not show are directly related or incurred on behalf of the Ferris Faculty Association.

THE COURT: So what does cost pool mean?

THE WITNESS: Once again, as I understand the concept, the concept of cost pool means that in order for an item to be chargeable you need to show that the expenditure was actually incurred on behalf of the particular bargaining unit in question.

BY MR. SCHMEDLEN:
Q. Now realizing that, as has been alluded to a number of times, that the parties differ on that legal issue, factually can you tell me whether the concept of a cost pool or a motion in limine type of approach could be actually carried out based upon what you have done in the years since Abood was rendered?
A. I don't believe it could.

Q. And could you describe why that is?
A. Well, for many of our programs in my opinion it is virtually impossible to allocate or show the particular activity which may be beneficial in a general sense and be tied to a particular bargaining unit. An example would be one, when one of our

lobbyists lobbies on behalf of appropriations for higher education in this state. I don't know of any, in my opinion, good way that you can make an allocation between the Ferris State College and the other [77]institutions that derive benefits from that lobbying activity.

* * * *

[80] THE WITNESS: That was the figure as I understand it that I would have to be, to prove was directly related to Ferris State College in that particular year. And then took a look at the various programs of the organization, the MEA [81]and some of our programs are more amenable to a cost pool analysis than others. Probably the best example of that would be the legal service program.

Our record-keeping system is set up so that we categorize our expenditures by employer, and so that is relatively easy for us to pull out the expenditures, legal service expenditures incurred and expended on behalf of Ferris Faculty Association.

* * * *

* * * *

[85]Q. Is it possible to directly trace every dollar to a specific bargaining unit?
A. I don't believe it is.

* * * *

[96]Q. Mr. McNenly, the Michigan Education Association is not itself the exclusive representative of the faculty at Ferris State College, is it?
A. That's right. The exclusive rep is the Ferris Faculty Association.

Q. And so the same answer would apply with regard to the National Education Association?
A. Yes.

* * * *

[100]Q. Mr. McNenly, the Ferris Faculty Association is the exclusive representative of the employee faculty members at Ferris State College for what purposes?
A. For collective bargaining, a negotiated contract, to administer that contract.

Q. And those purposes are defined by the Public Employment Relations Act?
A. Yes.

* * * *

[171] MR. LAJEUNESSE: Your Honor, I am handing the witness what has been marked plaintiffs' Exhibit No. 594. There is a [172]plaintiffs' 594 in the bench books we have provided the Court but yesterday Mr. McNenly testified that he used a copy of that exhibit in doing his computations with regard to the "Teacher's Voice," and that this is that version of the survey. It is the one upon which Mr. McNenly made his own notation. We are substituting that by agreement with the unmarked copy of plaintiffs' Exhibit No. 4.

THE COURT: Would you --

THE WITNESS: Yes, this is the content analysis that I referred to yesterday.

BY MR. LAJEUNESSE:
Q. Content analysis of "Teacher's Voice"?
A. Yes. For the period of September 7th, 1981 through August 16th, 1982.

MR. LAJEUNESSE: I move the admission of plaintiffs' 594, Your Honor.

MR. SCHMEDLEN: Pursuant to that agreement that he alluded to, no objection.

THE COURT: 594 is received.

MR. SCHMEDLEN: Your Honor, let me just clarify that the agreement indicated that the marked-up one with the "NC's" on it can come in because it was the subject of testimony. I think the record should reflect, however, that the document is being stipulated to in terms of its admission for the purpose of the mathematical calculations only. There [173]is in the document as well some opinion that we don't share in terms of descriptions or whatever, but we have no objection to its admission for the purpose of the actual calculations of the inches.

THE COURT: Well, it wasn't limited. What is the position of the plaintiff, plaintiffs?

MR. LAJEUNESSE: Your Honor, I think Mr. McNenly testified yesterday that he had no quarrel with the measurements contained in this document. He also does not question as I understand his testimony the fact that it is comprehensive and lists all of the article contained in the newspaper.

THE COURT: That is the question. For what purpose was it admitted?

MR. LAJEUNESSE: It is being offered as, two purposes, one showing the computation that was made by Mr. McNenly, and, two, as a summary of the articles contained in defendants' Exhibit No. A-4 which are the issues of "Teacher's Voice" for that year. I am not offering it as proof that items categorized, other particular categories, are chargeable or non-chargeable.

MR. SCHMEDLEN: I understand, and as to his first purpose there is no objection. I appreciate his indicating that it is not offered for the categorization, and that is why, my only point is as to the second point on the summary [174]we don't agree with the summaries where he is calling something collective bargaining and he is calling something something else. We have no problem with its measurement, measuring of the different column inches on all of these, and that has been testified to. We don't think that the categories make any sense,

and if that is going to be offered for that purpose then we want to cross-examine the person that made the categories. He is not -- the categories, you know, we do not stipulate to. We don't think they are accurate.

THE COURT: When you keep saying categories, are you talking about the material called, material in the middle?

MR. SCHMEDLEN: Methodology. It is the first after the cover sheet.

THE COURT: Oh, I see.

MR. SCHMEDLEN: Three pages. Everything after that is fine. You see, it says this is collective bargaining, that is strikes. We don't agree with that. We think that the articles and the titles of the articles speak for themselves, and they were properly measured. We just don't agree to the way they have been summarized, and we object to the part, the summarized --

THE COURT: Who prepared those two pages? Do you know?

[175] MR. SCHMEDLEN: Yes, I do. One of Mr. Lajeunesse's fellow employees in the National Right to Work Legal Defense Foundation.

THE COURT: Well, the objection is well taken. The Court will not consider Exhibit No. 594 as far as the first two pages are concerned, the three pages are concerned, but will consider the matters starting on numbered page four. Somebody has written in the number four under the general headings of issue, pages, material, and column inches, which is what I thought it was for in the first place. I didn't even see the first two pages.

MR. SCHMEDLEN: That is correct. Your Honor, I apologize for overlooking for a minute the rest that was in there. I had forgotten.

MR. LAJEUNESSE: That is all it is offered for at this point.

THE COURT: I assumed that.

* * * *

MR. LAJEUNESSE: Your Honor, I am handing the witness what has been marked for identification as plaintiffs' [176]Exhibit No. 612, and asking Mr. McNenly to identify that exhibit.

MR. SCHMEDLEN: Your Honor, as an attempt to save time we will stipulate those were the "Teacher's Voice" copies for that entire year. We do not have an objection to their admissibility, but we don't dispute what they are, and the defendant, what he is going to accomplish, I don't know if he needs the witness to do that. They are the documents summarized in that column inch study.

THE COURT: The authentication is done. Do you want it admitted? And if you want it admitted, for what purpose?

MR. LAJEUNESSE: Your Honor, I move their admission for the purpose of permitting the Court to be able if it wishes to validate the correctness of Mr. McNenly's characterization of the chargeability and non-chargeability of the contents of those papers. He testified that he examined them in relationship to the summary exhibit which has just been introduced in order to reach his 20 percent.

In addition, I offered them, he testified that this is sufficient an official publication of the defendant MEA and the articles in this newspaper describe the activities of the union. It would be helpful to the Court in determining the activities, the nature of the activities, in which the union is engaged.

* * * *

[178] THE COURT: True. Mr. Lajeunesse, do you have some quarrel with material that you yourself put in, Exhibit No. 594, with regard to the description of materials and the column mentioned?

MR. LAJEUNESSE: I don't have a quarrel with the description of materials, Your Honor, but I don't know how the Court can itself determine whether Mr. McNenly has properly categorized an article as chargeable or non-chargeable without looking at the articles themselves.

THE COURT: You may be right. The Court will admit Exhibit No. 612. The Court does not intend to read every single article in there, and I think there is considerable merit to the objection made by the defendants, considerable merit, but since I haven't had an opportunity to look through Exhibit No. 594 I can't say that Exhibit No. 612 is not relevant. That is why I admitted it. Okay, go ahead.

* * * *

TRIAL TRANSCRIPT, VOL. II,
TESTIMONY OF PETER McNENLY
Jan. 9, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

[Title omitted in printing]

* * * *

[244]Q. In 1981-1982, were support personnel in the same bargaining units as teaching personnel?
A. As a general matter, no.

Q. At a given institution you would have a separate bargaining unit for teaching personnel and non-teaching personnel. Is that correct?
A. Yes. Once again as a general rule.

Q. Why was that?
A. Because under the rules of the Michigan Employment Relations Commission it is once again generally determined that certified personnel are an appropriate bargaining unit [245]and non-certified personnel belong in a separate unit.

* * * *

[249]Q. I believe you testified yesterday, Mr. McNenly, that the Legal Services department provided assistance in 1981-1982 on retirement matters. Is that correct?
A. Provided representation to members in the handling of retirement disputes and problems if that is what you mean by retirement matters, yes.

Q. Were those members retired members?
A. In some cases they were in the process of retiring and there was a dispute as to the accumulated credit, for example, and so we have people who are just, have approached the age of retirement, and they go down to the retirement system, and they find after years of service they are not as they expected them to be. So they would be in that category. As well as retirees who later have a dispute over the amount [250]of the benefit.

Q. So that there are some of the people that you provide legal assistance in 1981-1982 who were people that were already retired?
A. Yes, former members.

Q. And those individuals were not in a bargaining unit represented by an MEA affiliate at that time, were they?
A. They were not currently employed.

Q. I believe you also testified earlier, Mr. McNenly, that the Legal Services department is on a fairly regular basis involved in litigation under the Michigan Teacher Tenure Act. Is that correct?
A. Yes, it is.

Q. And was so in 1981-1982?
A. Yes.

Q. Are the faculty of the Ferris State College covered by the Michigan Tenure Act, Mr. McNenly?
A. No, they are not.

Q. Does the state Tenure Commission have jurisdiction over the faculty of Ferris State College?
A. No.

* * * *

[266] [THE COURT:] The major dispute is which of those activities are chargeable, which are not chargeable, and why or why not; and that it strikes me is a question, a mixed question of law and fact, more law than fact. * * * *

* * * *

[296]Q. Mr. McNenly, I am handing you two documents which are marked for identification as plaintiffs' 68 and plaintiffs' 67. I got the order backwards. I am not intending, Your Honor, to put these into evidence. I just want to, briefly for the witness, to ask the witness a question about these documents. They are documents which are referred to by this witness' direct testimony.
A. Exhibit No. 68 was a copy of one of the monthly reports that we used in the program, and it contains a listing in this case of the open cases for the month of August, 1982, and involving a coordinating council which included various Ferris Faculty Association.

Exhibit No. 67 is a summary of the cases that were opened during the '81-82 fiscal year and involving Ferris Faculty Associa-

tion. My summary of those cases appears on [297]the first two pages, and actually the first three pages.

And then attached to that are copies of a form which we used to authorize cases entitled a legal service authorization, and also a work assignment form to one of my staff attorneys on a case, at Ferris -- as I said, a number of legal authorizations that went to the outside law firms, and they relate to the cases which are summarized on the first couple of pages.

I also see a work assignment to one of my other staff attorneys, and finally a work assignment to staff attorney Mary Jobe (ph.) involving case number 20360-C.

Q. Mr. McNenly, are these the records to which you referred yesterday, the day before, in your testimony when you said that you would, you could make a determination of the legal fees expended with regard to a particular bargaining unit?
A. These are a portion of our record keeping system. It is not a complete example of our accounting system, of our own internal accounting system.

Q. What are the numbers reflected here? Where are they derived?
A. Okay. For each piece of legal work, each case is a problem, and we assign one of these five digit numbers. Those numbers originated during this period of time from myself, and I have a pre-numbered pad of numbers, and they are torn off, and we fill out certain paper work, ah, to initiate a case. [298]And that is filled up by myself, and that is turned over to the secretary, and when the case file is opened, and we take that information and enter certain parts of that information into our data base, our computerized reporting system data base.

Q. What dollars are reflected? What is the source of those dollars? Is that --
A. The dollars that appear on the summary are taken off of the bills that we receive from our attorneys each month in the case of the outside attorneys or are taken off of the attorney time sheets in case of staff attorneys.

Q. So that items from two different sources are accumulated and summarized on these exhibits?
A. Yes.

Q. Isn't that a time-consuming process?
A. No. It is a highly automated process, currently that occupies given the fact that our program currently consists of somewhere between 900 and 1,000 active cases of any kind -- most of this work, in fact, virtually all of this work is done by my assistant and occupies, well, while a substantial part of her time, occupies I will not say all of her time.

In addition to that, my secretary and the other two secretaries in my department will spend varying amounts of time on maintaining them, processing and preparing the forms necessary to keep the system going.

[299]Q. The time involved in accumulating this data, keeping these records, is reduced by the, by virtue of the fact that you have the system in place. Is that correct?
A. The burden of this system is reduced by the fact that I don't have to maintain the system. I can have a secretary do it, and I have been able to delegate those responsibilities to someone else. Those clerical duties.

Q. There is also time spent by the attorneys themselves filling out the time sheets. Is that correct?
A. Yes.

Q. But you don't consider that burdensome?
A. No.

Q. Looking just briefly at plaintiffs' 67, Mr. McNenly, the cases listed there, are those all cases involving the Ferris State College bargaining unit?
A. Yes.

* * * *

TRIAL TRANSCRIPT,
TESTIMONY OF WARREN D. CULVER
Jan. 9, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

[Title omitted in printing]

* * * *

[2]Q. Your employment currently?
A. I am Associate Executive Director for MEDNA, M-E-D-N-A, Michigan Education Data Network Association.

Q. What is its relationship with the Michigan Education Association?
A. It is one of the organizations that are part of the MEA organization, and we provide a variety of services to the MEA, data processing, labor relations, personnel, accounting finance, and membership processing.

Q. Keeping in mind the Court's desire to get to the heart of the issue, could you very briefly describe when you started work for the MEA and trace your history very briefly to the end of the 1981-82 year?
A. I started as an urban executive director in Jackson in 1969 with the institution of the UniServ program in 1970. I became a UniServ director in Jackson County, and 1972 I moved to Grand Rapids as the UniServ manager for Western Michigan.

In 1973 I moved to the Detroit area to be [3]UniServ manager in Oakland and Genesee Counties, and when we reorganized I, I became UniServ manager for Fort Wayne, Oakland, Macomb, and St. Clair Counties.

And in 1977 I moved to Lansing to become Director of Public Affairs, Communications, and in 1981 of the reorganization, I became the director of the UniServ program for the state.

* * * *

[4]Q. Now at the end of the 1980-81 year, what was your position again in the MEA?
A. I was a director of Public Affairs and Communications.

Q. And what area of the MEA would be the area where the political consultants or lobbyists are employed with the MEA?
A. They would be employed within the Public Affairs end of the Public Affairs and Communications.

Q. Did you have any involvement in the preparation for the budget of '81-82 years in the Public Affairs, Communications division?
A. Yes, I did. In fact, I was probably the principal person in developing that budget.

Q. Have you ever heard the term "Preserve Public Education" that appears in numerous of the documents either marked or introduced?
A. Yes, I have.

Q. Can you describe for the Court briefly what the "Preserve Public Education Program" was in 1981-82?
A. The "Preserve Public Education Program" was an attempt on the part of the association to develop meaningful coalitions in the various communities so that we could pass millages, fight ballot issues, and do the kinds of things that are absolutely necessary fund public education, [5]so that we have some reason to be able to continue to exist, bargain the contracts, and gain some benefits for our members.

Q. So, specifically, what causes you to tie in your answer? Bargaining contracts, in that -- lobbying and -- in other words how, how do they relate?
A. Well, I think that one of the most important things that has to be understood about public employee bargaining is that the amount of money that we get comes from either local property taxes, state taxes and some from federal tax. And if we have no way of raising that money, which is all allocated through the legislative process or an election, then we have no way to bargain.

So it is really the front line bargaining of our contracts.

* * * *

[7]Q. Is higher education funding in Michigan structured differently from the funding for K-12 education? That is, kindergarten through high school?
A. Yes, it is. It is substantially different.

Q. Would you briefly describe the differences?
A. The X-12 funding for public schools is based on formula that was established many years ago. It is commonly known as the Crim-O'Neill formula.

THE COURT: The what?

THE WITNESS: Crim, Bobby Crim, C-r-i-m, and O'Neill is James O'Neill from Saginaw. And that is based -- it is an attempt to equalize local millage so that generally schools can be funded on a per pupil dollar amount at a relatively similar level. Higher education, however, works much differently, particularly the four-year colleges.

The constitutionally constituted college is, each receive an individual appropriation by the legislature, those being Wayne State, University of Michigan, Michigan State University.

The formula, the other four-year colleges, like Central Michigan, Ferris State, Grand Valley, received a four-year appropriation that is somewhat individual and [8]somewhat general.

The community colleges which are part of higher education have a formula that is different than K-12, but it is one that is applied to all of the community colleges.

* * * *

[37] THE COURT: I think there is a second part of the question that you haven't answered, and the second part interests me. How about a modified kind of time sheet in which the UniServ director only reported bargaining units that they were

working on in that day, or with on that day, and, or, assigning time as to that bargaining unit, without defining what it is that they were doing?

THE WITNESS: I never really thought of doing that, Your Honor, and I think there are a couple of reasons why I wouldn't feel that that would be very important to do right now.

In our larger UniServ units where they have 14 or 15 bargaining units, the relative time that they spend with the Kalamazoo teachers as opposed to Kalamazoo secretaries as opposed to Galesburg-Augusta teachers, really isn't a very relevant issue I don't think to the union.

I think the issues that are important to the union are do the contracts get bargained, do the arbitrations and grievances get processed and handled professionally and effectively. And the fact that we are [38]bargaining 30 percent of the contracts in the Kalamazoo area this year and not bargaining the other 60 percent because they are on first and second years of three-year contracts is a relatively unimportant issue.

And yet, if you were to look at those facts, I might see that Kalamazoo City because their bargaining contract is a very disproportionate share of the UniServ director's time, and it would look like Kalamazoo Valley Intermediate School District's personnel are getting absolutely no attention. So it really doesn't, it doesn't really track for union purposes.

What we really need to know is as a union, and a coordinating council, are all of the units getting serviced, and are their contracts getting bargained, and are their grievances getting handled, and arbitrations heard, and dismissals taken care of.

* * * *

TRIAL TRANSCRIPT,
TESTIMONY OF MITCHELL E. ROTH
Jan. 10, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

[Title omitted in printing]

* * * *

[2]Q. Where are you employed?
A. With the National Education Association in Washington, D.C.

Q. And what capacity?
A. As a staff attorney in the Office of General Counsel.

[3]Q. And how long have you been employed in that capacity?
A. Since June of 1980.

* * * *

[27][Q.] Could you direct your attention to the defendant's Exhibit No. GGGG? I believe it is in a folder toward the end of the, of the book. It is blue, and you can pull it out so it can be used. Can you identify that?
A. Yes, this is the program accomplishment report that I was referring to for the 1981-82 fiscal year.

Q. Briefly, what is the purpose of the document?
A. What that document is, is a summary of activities within the programs of the NEA, what particular fiscal year, and some subprograms as well, and it reflects the amount that was budgeted for those programs, and the amount that was finally expended for those programs in that year.

THE COURT: Did you use this document in calculating what would happen if the Court ruled that strike activity was non-chargeable?

THE WITNESS: Strike activity.

MR. SCHMEDLEN: Strike activity or whatever.

THE COURT: What was it?

MR. SCHMEDLEN: Organizing activity.

THE COURT: Organizing activity. I am sorry. In general? Organizing activity. I am sorry.

THE WITNESS: Yes, yes.

THE COURT: Who prepared it?

THE WITNESS: The program accomplishment report is to my knowledge prepared in the, in the accounting division [28]or whatever --

THE COURT: In Washington?

THE WITNESS: In Washington.

THE COURT: Is it prepared annually?

THE WITNESS: Yes, it is.

MR. SCHMEDLEN: To save time, I don't think there has been an objection --

MR. LAJEUNESSE: No objection.

THE COURT: Well, do you want to offer it then, G --

MR. SCHMEDLEN: I will offer it.

THE COURT: GGGG?

MR. SCHMEDLEN: I apologize for interrupting.

THE COURT: GGGG, four G's, is received.

* * * *

TRIAL TRANSCRIPT, VOL. II,
TESTIMONY OF WAYNE S. DIVINEY
Jan. 10, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

[Title omitted in printing]

* * * *

[313]Q. Where do you work?
A. National Education Association, Washington, D.C.

[314]Q. How long have you worked there?
A. Approximately five and one-half years.

Q. What is your present job title at the National Education Association?
A. Manager of accounting.

* * * *

Q. Briefly describe your responsibilities in that capacity [315]during the 1981-82 year?
A. I was responsible for the receipt and disbursement of all funds of the association, of generating the financial reports of the association, both to internal management as well as to governance of the association, and a generation of reports to outside agencies

as appropriate, the Internal Revenue Service, Department of Labor, so forth. I also had the responsibility for coordinating the annual audit of the associaton's records.

Q. I am not sure that I made this clear in the record. What was your title during 1981-82?
A. It was manager of accounting.

* * * *

[330]Q. When you testified on direct, Mr. Diviney, you said that each expenditure would be coded by a nine-digit code. Could you explain that in terms of these charts of account?
A. Yes, I can. The last two pages of Exhibit 619 refer to area designations and use a reference to a major account. The major account is listed under there, governance, would be AO1, would be the first three digits of that nine-digit number. That would be for the Representative Assembly. It is a classification process to identify, that is, for the Representative Assembly.

The activity code would be the final three digits of that nine-digit code which would indicate a specific activity relative to the budget that would be applicable to.

The middle three digits are referred to as minor expense account definition which is that natural expense classifications, travel, salaries, so forth.

Q. And under the area designations in plaintiffs' 619, under affiliate services, there are a number of codes which enable you to classify expenditures in the affiliate services department by region. Is that correct?
A. Among other things, yes.

Q. What is the purpose of that?
A. We have people located throughout the country in regional offices. CO1, for instance, as noted on here, is the Pacific [331]States Regional Office, but then 02 is Western States. So forth. We have both an administrative budget from the standpoint of identifying the departmental division lines and so forth

and where people are located, but then within the program aspect of it, from an overlay, tells us what they are doing.

Q. You break it down to place and to function?
A. That is correct.

* * * *

[336]Q. You mentioned in your direct testimony, Mr. Diviney, the phrase "time sheet." Is each NEA employee required to complete a time sheet that indicates daily activities?
A. Yes, they are.

Q. The activities reflected on those time sheets or activity reports are coded by account number in accordance with the chart of accounts. Is that correct?
A. That is correct.

Q. The time itself is allocated by code. Is that correct?
[337]A. Yes, it is.

Q. And those reports are then summarized bi-weekly?
A. Yes.

Q. Are these reports then used for distributing salary accounts in terms of the NEA existing chart of accounts?
A. Yes, they are.

Q. Do NEA employees on occasion work on more than one program?
A. Yes, they do.

Q. So that if an individual works on more than one program the time sheet process involves an allocation of his time by program area, breaks it down into different program areas he is working on. Is that correct?
A. Yes, that is.

Q. Is it true that by such an allocation you are getting a more accurate determination of the full costs of a program?
A. Yes.

* * * *

[341]Q. If the accumulation of costs by bargaining unit were required but only of those employees who provide services to particular bargaining units as opposed to employees who have [342]general functions which might affect many different bargaining units, could coding by bargaining units be difficult?
A. Again that would, that would be difficult within the constraints of the existing system.

Q. It would require the addition of additional codes for the system?
A. A system rewrite.

Q. You would have to add to plaintiffs' 619, for example, to the area designations where we now have it coded by regional office, you would have to add a series of codes for a specific bargaining unit. Is that correct?
A. There are 12,000 bargaining units across the country. I am not sure how that would be even possible from a practical standpoint.

* * * *

[353]Q. Mr. Diviney, I think there was a point when Mr. Lajeunesse was asking you a question dealing with the subject of these 12,000 bargaining units and some effort to allocate, and I noted in part that your answer said that you weren't sure that that was possible from a practical standpoint. Could you explain what some of your reasons or doubts are as to whether that would be a practical possibility, to allocate expenditures of time by NEA employees to one out of 12,000 bargaining units as an example?
A. Well, just anytime that you use the number of 12,000 [354]individual breakdowns, it is a, it becomes immense to try to

deal with. As an example, in our research division, we would have someone that would be analyzing certain information that would be dealing with, ah, some segment of collective bargaining process or some segment of salary schedules, things of that nature that would be relevant information applicable to and used in the bargaining process of each of those 12,000 local associations, local bargaining units.

Are we to say then that while that research staff person was working on that project for two weeks' time that that person's time would have to be distributed in 12,000 different ways? I mean, I think that is the ultimate end of it if we are trying to get that kind of direct relationship between the funds that were expended for a purpose that would be applicable to the universe* that would have to be applied back to that individual bargaining unit. It becomes, it becomes beyond what an accounting system is designed to do, quite frankly, our particular accounting system is designed to do, and, quite frankly, I have never seen one that attempts to do that kind of, of extremely finite breakdown.

I question the validity of the information once it gets down there.

Q. Separate from that burden then, why do you question the validity of it, just focusing on accuracy?
A. There is the local association, a state association, and a [355]national association. We have a unified organization. The local does what it does best. The state does what it does best, and the national does what it does best. All right. And that is the way we try not to have an overlap of services in our operations in the way that we try to do business.

The dues, revenue that comes into the National Education Association, what our membership is paying for is basically outlined in our program budget. They are paying for that, for that lobbyist in Washington to represent them on collective bar-

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(*witness said universe. Did witness mean UniServ?)

gaining issues or things that might affect their contract. They can't send out of their locals someone to Washington to lobby in their behalf. That is the union concept and unification concept that we use.

Should that lobbyist's time in that particular regard go back to maybe 7,000 locals in that particular lobbying effort while he was over on Capitol Hill that day, go back to those 6,000 units that applied to? It becomes one of not having a relevance in terms of whom it applies to but just the concept of we need to have someone out there representing us.

* * * *

[357]Q. Very brief recross, Your Honor. Mr. Diviney, you understand the difference between direct costs and indirect costs, I assume?
A. I have an understanding of that. I would assume it agrees with yours, but I can't be sure.

Q. The lobbyist that you described is lobbying on Capitol Hill on a particular bill which affects individuals all across the country. Would you agree with me that this is an indirect cost?
A. Basically, yes.

[358]Q. And the research person who prepares a data compilation that might be used in any bargaining unit across the country in collective bargaining negotiations, would you agree with me that that person, his services, are indirect costs?
A. Yes.

Q. Would you have the same problem with the accumulation of data by bargaining unit if I said that that coding by bargaining unit would apply only to direct costs, direct services, and not to indirect costs and services?
A. Yeah, I would, I would on a couple of, on a couple of notes. One is that, that again we are talking about 12,000 individual bargaining units. All right. And 12,000 additions to our chart of accounts.

Q. Aside from the addition to the chart --
A. Further, you have direct costs that are related to publications, for instance, all right? And we send out publications. NEA, now there is a document that goes out to a distribution of, I forget the exact number of it, to local leaders throughout the country. Each bargaining unit will get a group of those publications. There is a direct cost of getting those directly mailed to that individual bargaining unit.

Q. Assuming that that is an indirect cost, I agree with you it is -- assume that.

MR. SCHMEDLEN: You are assuming what? It is what?

[359] MR. LAJEUNESSE: That the publication of a newspaper which goes to the entire membership, I don't see any difference between that and a research report which has been used in any bargaining unit or lobbying activities which affect all members. I am saying focus just on people who work out in the field and provide direct services to specific bargaining units. Do you have any problem with those individuals keeping time records coded by bargaining unit?

THE WITNESS: I believe they could note on their time sheets which locals they visited.

* * * *

TRIAL TRANSCRIPT,
TESTIMONY OF WARREN D. CULVER
Jan. 13-14, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

[Title omitted in printing]

* * * *

[40] MR. SCHMEDLEN: That is -- I will withdraw the question, Your Honor. Let's focus first on whether or not you believe that time sheets could be accurate from the standpoint of allocating time from one bargaining unit as opposed to another bargaining unit.

THE WITNESS: I really don't think that it would be an accurate kind of an assessment. The bargaining, the coordinating council that the UniServ directors work for -- it varies so very much.

In a city like Lansing where I now live, you have a UniServ director who spends essentially 100 percent of his or her time working for the Lansing bargaining unit because it is so large. Whereas, in suburban Ingham County, there will be 15 different bargaining units in the coordinating [41]council that the UniServ director serves. So you don't really tell much what is going on in a bargaining unit just because they spend time in a bargaining unit.

The other problem that I have in that concept is that in our more rural coordinating councils they will, the UniServ director will cover Hillsdale and St. Joseph County, maybe. And they will have 22, 23 bargaining units in their service area. And inasmuch as we try very hard to bargain multiple year contracts, for instance, you will very often spend a great deal of time in one year in a given bargaining unit while you will be spending substantially less time in non-bargaining years in that bargaining unit; and it reflects no purpose to me as to the MEA, and I don't think it accurately reflects the work of the UniServ director, what bargaining unit they were in. So that doesn't really mean very much to me.

* * * *

[59]Q. What is a crisis center used for in the context of these job action reports and in the context of this hard bargaining that you have just described?

A. A crisis center is, if we ever have to have a strike, we have to have a place for work to go on. Our UniServ offices generally aren't located in every one of our bargaining unit areas, or they are not large enough to hold a meeting of the bargaining unit members. And if we have a job action, we are not going to be able to use school facilities.

So we prepare a work meeting site in advance, and it does a couple of three things. If you have to have a job action, obviously, it fulfills the purpose for which it was created and named. On the other hand, it demonstrates to the community and to the employer that we are serious. We have had a job action investigation. We have gone and talked to the superintendent about our concerns, as a state organization, what is happening in our local.

We probably engage in some informational picketing. And one of the other things that we will do is set up a loan system with the local credit union. There are a whole lot of pieces with this job action investigation. And the crisis center is one of them. And more often than not as I indicated, probably, six out of seven times or seven [60]out of eight times we never have to use the facility. We will simply secure it and pay a couple of weeks rent, and thankfully never have to use it because it has served its purpose, helping to build the pressure and get to the situation, get the situation resolved.

* * * *

[66]Q. One of the assigned responsibilities of the UniServ director, Mr. Culver, was to act as secretary-treasurer to the coordinating council political action committee. Is that correct?
A. Yes, that is true.

Q. When did collective bargaining for public employees begin in Michigan, Mr. Culver?
A. In 1965.

Q. Did the Michigan Education Association exist before then?
A. Yes, it did.

Q. What were its services before collective bargaining was authorized in Michigan?

MR. SCHMEDLEN: Objection, relevance.

MR. LAJEUNESSE: I think it goes to the question of relatedness.

THE COURT: It might. The objection is overruled.

THE WITNESS: Before 1965, the MEA had served as an organization only for teachers, and it provided professional, instructional help for teachers. Strangely enough, it had the collective bargaining system, and we started bargaining some contracts in some school districts before the statute was passed in the state. Provided [67]retirement, tenure.

Q. The MEA on occasion lobbied before the collective bargaining law was passed?
A. Yes, it had a lobbyist before that time.

Q. Did it engage in public relations before the collective bargaining law was passed?
A. Yes, it did.

Q. Did it engage in organizing activities before the collective bargaining law was passed? Membership recruitment?

MR. SCHMEDLEN: Objection, Your Honor. When he says organizing, it doesn't make sense. We are talking about organizing, in the way that I think that term is used in this area, we are talking about organizing people to be in collective bargaining units, and I don't, just don't see how that can make sense before you have a law that permits collective bargaining.

MR. LAJEUNESSE: I amended my question, Your Honor, to specify members --

THE COURT: Yes, membership recruitment.

THE WITNESS: Yes, we did engage in membership recruitment.

BY MR. LAJEUNESSE:
Q. Did you engage in millage elections before the collective bargaining law was passed?
A. Yes, we did.

[68]Q. I believe I asked you about lobbying?
A. Yes, you asked about it.

Q. Was Kai Ericson (ph.) your predecessor as associate executive secretary or director of the Public Affairs Department?
A. Yes, he was.

MR. LAJEUNESSE: I am handing the witness what is marked for identification as plaintiff's Exhibit No. 529. It has been stipulated in the pretrial order, Your Honor, that this exhibit is authentic and a business record of the MEA.
Would you identify the document, Mr. Culver?

THE WITNESS: It is a letter from Kai Ericson to Morris Andrews (ph.), dated January 4th, 1975, and entitled "Organization of Services, UniServ."

BY MR. LAJEUNESSE:
Q. And this is Kai Ericson whom you testified was your predecessor?
A. Yes.

Q. As head of Public Affairs for the MEA?
A. Yes.

Q. And attached to this memorandum is a summary dealing with the nature of the UniServ program. Is that correct?
A. I am sorry? What did you call the attachment? I am sorry?

[69]Q. It is headed to be association services to members.
A. Oh, okay. That is attached.

Q. And goes on to discuss the UniServ program. Is that correct?
A. Yes.

MR. LAJEUNESSE: I move the admission of the exhibit, Your Honor.

MR. SCHMEDLEN: Objection, relevance. Among other reasons, this document is only seven years prior to the year in question. And because of that, I don't see that it helps us in light of the parties' stipulation of what we are interested in this case is the 1981-82 school year. I don't think that this document given its date can be relevant for purposes of that particular year.

THE COURT: Mr. LaJeunesse, why would it be relevant?

MR. LAJEUNESSE: Your Honor, I believe this document shows the relationship between collective bargaining and other MEA activities which are in issue here, and it shows that relationship was not and is not as on direct as the MEA claims. This is an MEA employee in a managerial position giving his opinion on the same issue testified to by the witness, and I would mention a significant interest on that issue.

It also shows the nature of the services [70]for which UniServ directors are responsible and rebuts the witness' testimony as to the de minimis scope of the non-bargaining responsibilities of the UniServ director.

THE COURT: Although it is highly problematical, the Court will admit Exhibit 529 for whatever it is worth.

* * * *

[86]Q. Mr. Culver, do you believe that all MEA activities are really related to collective bargaining?
A. Do I personally believe that?

Q. Yes.

A. Yes, I do.

* * * *

[107]Q. Mr. Culver, I am handing you what has been marked as plaintiff's Exhibit No. 73 for identification and ask you to examine that document, and then turn to the page which I have opened it to. Could you tell us what the document is in its entirety, please?
A. It appears to be an agenda for the fall Representative Assembly in November of 1982.

Q. And if you will turn to, actually not the specific page, but the section that begins section "F"?
A. I have that.

Q. Could you describe what that is?
A. Section "F" is a report by the association of progress achieved on its goals and objectives.

Q. And what does that report include within it?
A. Provide bargaining representation, protect legal rights --

[108]Q. No, I don't mean the specific items. What is the general purpose of the report? What does it tell to the Representative Assembly?
A. The type of progress we made in the past year.

Q. On what?
A. On goals, our association goals.

MR. LAJEUNESSE: Well, Your Honor, I obviously have no desire to introduce the entirety of plaintiff's No. 73, but I would like to move the admission of just Section "F" which is the report card on the goals and objectives of the Michigan Education Association for the year 1981-82. It is nine pages long.

THE COURT: I haven't been able to find it. So I guess I better find it if there is going to be an objection.

THE WITNESS: On F-2.

THE COURT: I see it.

MR. LAJEUNESSE: It starts on --

THE COURT: Yes, I see it.

MR. LAJEUNESSE: "F" and then F-1.

THE COURT: I see it. Mr. Schmedlen.

MR. SCHMEDLEN: To save time, Your Honor, I won't object. The document does not allocate time, but conceivably the Court could find it of some relevance.

THE COURT: The Court will receive pages F-2 through F-9 of the Exhibit 73.

[109] MR. LAJEUNESSE: Your Honor, I think I in moving its admission referred to both the cover, F-1 through F-9. The only reason that I suggest that is there are some explanatory remarks on F-1.

THE COURT: I will receive the cover on F-1, through F-9.

* * * *

[142]Q. I hand the witness what is marked as plaintiff's Exhibit No. 164 for identification. In the pretrial order this document was stipulated as to authenticity, and the fact that it was a business record with the NEA. I ask you to identify this document.
A. It looks like one of the working drafts set up for what the time schedule would be for the Preserve Public Education program, implementation.

Q. And the date on the job request, which is the first page of the exhibit, is February 15, 1982. Is that correct?
A. That is correct.

Q. And the PPE program had been adopted by the board of directors prior to that date. Is that correct?
A. That is true.

Q. To return to the substance of the exhibit, the first part is the working draft, number five, activities scheduled, and time lines for PPE. Is that correct?
A. Yes, that is what it says.

Q. It describes various activities, who is responsible for them, has responsibility for them, and the date on which they were expected to be implemented. Is that correct?
A. Yes.

Q. And the second portion following that time line lists the [143]responsibilities of the different MEA departments for implementation of PPE by department. Is that correct?
A. I believe so. I haven't got past Government Affairs. Yes, it does.

Q. And if you turn to the last page, the last page --

MR. SCHMEDLEN: The last page of the draft or the last page of the whole exhibit?

MR. LAJEUNESSE: The last page of the whole exhibit. That page lists UniServ responsibility for PPE. Is that correct?

THE WITNESS: Yes, it does.

MR. LAJEUNESSE: Your Honor, I move the admission of plaintiff's 164.

MR. SCHMEDLEN: Your Honor, in the possible interest of saving time, rather than reading the document now, and then to state the nature of the objection, I make no objection although I think the document is of little if any relevance.

THE COURT: I can't tell. I will receive it. No. 164 is received.

BY MR. LAJEUNESSE:
Q. Mr. Culver, plaintiff's 164, although it may be headed working draft, in fact was the outline of the PPE program adopted by the MEA board of directors in 1981-82. Is that correct?
A. I believe, I believe that it summarizes the implementation [144]of that program, yes.

* * * *

[174]Q. I am handing the witness what has been marked for identification as plaintiff's 168. The authenticity and the fact that this is a business record have been stipulated in the pretrial order. I ask you to identify this document.
A. This is a memo to MEA board of directors, local association presidents, and UniServ directors, from the Membership [175]Services department, dated February 19, 1982, and entitled, "Preserve Public Education" dash "Posters and Ads."

Q. And the memo reflects that this document was sent to UniServ directors. Is that correct?
A. They are addressed, yes.

Q. And attached to the memo are a number of different posters that were used in the Preserve Public Education program in 1981-82?
A. Yes.

Q. And if you will look at the first poster, one that says, quote, practically every decision affecting education is a political decision, unquote, and the larger poster that for purposes of

reproduction had to be broken up into two pages, which has a quote from President Kennedy, says, quote, preserve public education by becoming active in the political process, unquote -- oh, good. Your copy was not broken up?
A. No, but it is also stapled together. So I can't read it. Do you mind if I pull the staple?

Q. Sure. Do both of those posters, Mr. Culver, show that or ask that a person who wants more information with regard to Preserve Public Education program contact your local association president or UniServ directors?
A. Yes, it does.

MR. SCHMEDLEN: Your Honor, I will stipulate to the admission of the document to save time. What we are doing is [176]we are reading it, and then having it offered, and I think--

MR. LAJEUNESSE: I was trying to establish the relevance. I expected an objection.

MR. SCHMEDLEN: I will stipulate to its admission. I think it does describe the Preserve Public Education program. Even though it is cumulative, it might save time to simply admit it.

THE COURT: If you want to offer it. 168?

MR. LAJEUNESSE: Please, Your Honor.

THE COURT: All right. Proceed.

* * * *

[179]Q. Mr. Culver, are there issues in bargaining in higher education units which are different from bargaining in "K" through 12 units?
A. Yes, sir. I think different bargaining units have unique issues.

Q. Depending upon the type of employees involved?
A. Well, there can be some. There are many common issues, and there are some unique issues.

Q. Are there issues in bargaining in higher education units which are different than bargaining in support personnel?
A. Along with common issues, yes, there are some unique issues.

Q. Is it common for bargaining in a teacher unit to set a pattern for a higher education unit?
A. Well, I think it is common or more common with the community colleges than it is with the four-year institutions.

Q. Can you get -- you say it is more common. Can you give us a specific example from 1981-82 of a contract provision being bargained in a "K" through 12 unit that set a pattern for a higher education unit?
A. A specific contract, no.

Q. Specific contract provision. You don't have to tell me which unit it was. One that was bargained in 1981-82?
[180]A. No, I can't.

Q. Can you give us an example of a contract provision bargained in a support personnel unit which set a pattern for a higher education unit?
A. I think there is bargaining in the K-12's and in the support units that do give patterns for the higher education units, particularly seeing that the higher ed units came into -- much later than the K-12 units. There is not necessarily one in any one given year, but the argument we are having today on agency shop is a pattern kind of thing. The dues reduction, the fact that we have the right to bargain over issues of curriculum, or how we feel with fringe benefits, and whether or not retirement supplements are legal to public employees in the state of Michigan, those are all bargaining, K-12 units, and had tremendous impact on the higher ed units, including the four-year colleges. The fact that we -- I don't want to use the same -- plowed the ground in

the K-12 school district is very, very important I think for the bargaining of higher education units.

MR. LAJEUNESSE: Your Honor, the answer was non-responsive to my question. The question was directed to the support personnel units, to give specific examples of how the support personnel unit bargaining set a pattern for higher education.

[181]THE COURT: You may be right. It was responsive to an earlier question, and the answer was helpful to me. You are probably right. So you may ask the question about the support unit again.

THE WITNESS: I am sorry. I am not aware of any, ah, right off the top of my head that have been particularly beneficial in higher ed faculty units. Higher ed support units, yes, definitely.

* * * *

[182]Q. I believe I will restate for the record the question. Is any of the time at the Michigan Education Association Representative Assembly devoted to matters which are considered not chargeable by the MEA?
A. Generally speaking, a Representative Assembly will discuss during an issues portion of their deliberation issues that any delegate wants to bring before the assembly. And from time to time there will be issues that, I think that might be considered non-chargeable, such as there might be some debate on right-to-life issues or gun control.

Q. Mr. Culver, I hand you what has been marked for identification as plaintiff's Exhibit No. 70, and ask you to identify this document. It has been stipulated in the pre-trial order that it is authentic and a business record of the MEA.
A. This is a copy, apparently, of the keynote address at the fall, 1981 MEA Representative Assembly, given by Dr. Richard C. Devor (ph.), and entitled "The Myths of the Arms Race."

* * * *

[189]Q. Mr. Culver, I hand you what has been marked for identification as plaintiff's 158. Again the authenticity has been stipulated and the fact that it is a business record. This is a copy of the minutes of pre-NEA R.A. coordinating committee meeting, held in March, 1982. That would have been a meeting [190]held in preparation for going to the National Education Association Representative Assembly that occurred during the 1981-82 year. Is that correct?
A. Oh, yes, it is a meeting where our, where our members get together with the region coordinators, the officers, and the MEA board of directors, to get ready to go to the National convention.

Q. At that meeting, one of the items of business as reflected in appendix "D" was to adopt the MEA priorities for the delegation at the national convention, correct?
A. I haven't gotten that far yet.

Q. That is what it says on appendix "D." The goals of MEA delegation are trying to adopt the goals of MEA at the Representative Assembly.

MR. LAJEUNESSE: Your Honor, I move the admission of plaintiff's 158.

MR. SCHMEDLEN: Your Honor, objection, relevance, and it is also cumulative. Several minutes ago when we started on this charade, the witness testified to exactly that effect.

THE COURT: Didn't the witness already testify, Mr. LaJeunesse, that the major purpose of the MEA attending the NEA delegate representative assembly was to promote the goals of the MEA, which is all that the exhibit says?

MR. LAJEUNESSE: No, Your Honor, I believe the [191]exhibit gives what the specific goals were. For example, number one, "make the passage of a national collective bargaining bill."

THE COURT: Do you want to put in appendix "D" then? Do you want me to read --

MR. LAJEUNESSE: That is fine.

THE COURT: Will the other 14 pages help at all?

MR. LAJEUNESSE: No, Your Honor. I would --

THE COURT: The Court will receive 158 as to appendix "D" although I believe it to be possibly cumulative. I will receive it. The remainder of Exhibit No. 158 I reject.

* * * *

[199]Q. I hand you what is marked for identification as plaintiff's Exhibit No. 21. Again it is stipulated in the pretrial order that there is no objection to the admission of the document. Plaintiff's 21 is the minutes of a board meeting of the Ferris Faculty Association. * * *

* * * *

[200] [MR. LAJEUNESSE:] * * * I will move the admission of plaintiff's Exhibit No. 21.

* * * *

[201] THE COURT: I will receive Exhibit No. 21. I don't need the speech on it. I notice that it is unapproved minutes, but I will receive it just the same. As opposed to approved.

MR. LAJEUNESSE: Your Honor, it was stipulated that it was a business record. These are the only minutes that were produced by the defendant local.

THE COURT: All right.

MR. LAJEUNESSE: They were represented to us as the official minutes.

BY MR. LAJEUNESSE:
Q. I hope we can do this very quickly. I am handing to the witness what has been marked for identification as plaintiff's Exhibit No. 55 and also 57. Again, 55 is a. both of these have been stipulated in the pretrial order. There is no objection to their admission. Plaintiff's 55 is a letter [202]from Mark Jenkins. Mr. Jenkins served as one of the temporary UniServ directors for unit 13, 1981-1982. Is that correct, Mr. Culver?
A. Yes, he did.

Q. That is a letter from him to Art Rice. Who is Art Rice, Mr. Culver? R-i-c-e.
A. One, number 55 is a letter from Mark Jenkins to Art Rice, who was higher educatio[illegible]ant.

Q. For the M[illegible]gan Education Association?
A. For the [illegible]

MR. LAJEUNESSE: Again, this discusses the functions of the coordinating council, Your Honor, and referring to plaintiff's 55, and mentions political activity and Preserve Public Education program. Again it shows the implementations of these programs at the local level. It involves the unit in question in this case, and I move the admission of plaintiff's 55.

* * * *

[203] THE COURT: I think it is easier for me to receive it and read it later on, and decide if it is or not. I will certainly conditionally receive 55.

* * * *

[204]Q. Mr. Culver, I hand you what is marked plaintiff's Exhibit No. 39 for identification, stated in the pretrial [205]order that there was no objection to the admission of this document.

Plaintiff's 39 is five mailgrams to members of the Michigan State Senate and the House of Representatives from the Ferris State College Faculty Association, the name of the organization, and the address of the Michigan Education Association, 130 Maple Street, Big Rapids, Michigan.

Would you stipulate that that is the UniServ director's office?

MR. SCHMEDLEN: Yes.

BY MR. LAJEUNESSE:
Q. Would the cost of this type of communication have been paid for out of the UniServ director's funds?
A. Either that or PAC administration on the local coordinating council.

Q. Mr. Culver, I am handing you what is marked as plaintiff's Exhibit No. 56 and plaintiff's No. 38. Again in the pretrial order, it stipulates that there is no objection by defendants for admission of either of these documents. Plaintiff's 56, that is a letter from Mr. Jenkins, the UniServ director for unit 13-E, to Dick Ringstrom (ph.), the zone director, supervising him, correct, Mr. Culver?
A. Yes, that is correct.

* * * *

[206] [MR LAJEUNESSE:] * * * * I move the admission of plaintiff's 56 and 38.

* * * *

[208] THE COURT: The Court will receive 56 and reject 38. No. 38 doesn't seem to help the case at all.

BY MR. LAJEUNESSE:
Q. Mr. Culver, what is the MEDNA that you are presently employed by?
A. Michigan Education Data Network Association.

Q. And what does it do?

MR. SCHMEDLEN: Objection, Your Honor, absent some showing of relevance, I don't think it even existed in 1981-82.

MR. LAJEUNESSE: I will ask another question. Is all of its business with MEA and its associated organizations?

MR. SCHMEDLEN: Same objection, Your Honor. The time frame doesn't sync with this case.

THE COURT: The objection is sustained.

MR. LAJEUNESSE: If I may explain the purpose of the questions, they go to the bias of the witness.

THE COURT: If they go to the bias of the witness, I will reverse myself, and you can answer the questions.

BY MR. LAJEUNESSE:
[209]Q. The question was, Mr. Culver, is all of MEDNA's business with MEA and its associated organizations?
A. Our business is with the MEA, MEASSA, MEDNA itself, and MEALS, which is a Michigan Education Legal Service Insurance--

THE COURT: You guys have more acronyms than the federal government does.

THE WITNESS: That is probably correct. And we provide services to those organizations, and we provide services to MEA PAC, which is one of our affiliated --

MR. LAJEUNESSE: Your answer to my question is all of its business is with the MEA and associated organizations, yes?

THE WITNESS: To the best of my knowledge, yes.

BY MR. LAJEUNESSE:
Q. If the MEA's revenues were to decrease, would MEDNA's business be affected adversely?
A. I really don't know the answer to that. I suppose if the MEA went out of business the answer would be yes.

* * * *

[226]Q. I believe you testified on direct that you received the job action investigation reports?
A. Generally, that is true.

MR. LAJEUNESSE: Your Honor, I hand the witness what is identified for purposes of identification as plaintiff's 29. The pretrial order stipulates that plaintiff's [227]29 is admissible without objection. I intended, Your Honor, to introduce this originally through Diane Malmo (ph.).

MR. SCHMEDLEN: No objection to the document being admitted, Your Honor, if that will save time.

THE COURT: Exhibit No. 29 is received.

MR. LAJEUNESSE: And that is the job action investigation report for the Ferris Faculty Association in the negotiations in the fall of 1981. Is that correct?

THE WITNESS: Yes.

* * * *

TRIAL TRANSCRIPT, VOL. II,
TESTIMONY OF STEVEN H. HANKE
Jan. 14, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

[Title omitted in printing]

* * * *

[360]Q. What is your occupation?
A. I am a professor o[f] Applied Economics.

Q. Where are you employed?
A. Johns Hopkins University in Baltimore, Maryland.

Q. Are you tenured?
A. Yes, I am.

Q. How long have you been employed at Johns Hopkins?
A. Since 1969.

Q. Mr. Hanke, I am handing you what is marked for identification as plaintiffs' Exhibit No. 604. To expedite the time, plaintiffs' 604 is Mr. Hanke's resume. Rather than trying to have him orally give us his very lengthy background, I think it is simpler to put in his resume in evidence and only hit the highlights.

THE COURT: I agree. Exhibit No. 604 is received. I am sure there is no objection.

BY MR. LAJEUNESSE:
Q. You have the resume in front of you, Mr. Hanke?
A. Yes, I do.

Q. The first page states that you received your Bachelor of Science at the University of Colorado in 1964. In what subject did you receive that degree?
[361]A. That was in Business Economics.

Q. And your Ph.D. was received in 1969 also from the University of Colorado. In what subject did you receive that degree?
A. That was Economics.

Q. Your professional experience in addition to the academic appointments listed on page one lists a number of public sector appointments on page two, the first being that you are a member of the Governor's Council of Economic Advisors in Maryland. By whom were you appointed to that position?
A. Governor Marvin Mandel.

* * * *

Q. The second lists you as a senior economist on the President's Economic Advisors. That would be President Reagan?
A. That is correct. Is the appointment --

Q. Were you appointed by President Reagan? I am sorry.
A. Yes.

Q. And the third item lists you as, as presently -- I presume that continues until this present day -- a member of the Joint Economic Committee for the United States Congress. Is that correct?
[362]A. That is correct.

Q. I should say senior economic advisor. You are not a member of Congress. That is a bipartisan committee?
A. That is correct.

Q. By whom were you appointed as senior economic advisor to the Joint Economic Committee?
A. Originally Senator Jepson, and most recently Congressman Obie (ph.sps.).

Q. Have you ever received any more recent public sector appointments not listed on plaintiffs' 604?
A. Yes, I have been recently appointed to the President's Task Force on Economic Justice.

Q. Pages two and three list a number of research appointments. Have you received any research or professional appointments not listed on plaintiffs' 604?

A. A research appointment as a senior fellow at Ludwig Von Mises Institute in Washington, D. C.

Q. Can you give us some idea of the nature of your work in the research appointments?
A. Yes. The first three, the appointment in France, Austria and Sweden, '78 through '81, were all primarily dealing with the analysis of costs for nationalized or public sector entities. From the '83 appointment, the Heritage Foundation as well as the, '84 through '85, Manhattan Institute, and the Ludwig Von Mises Institute very, I have been primarily [363]doing research on the effects of property rights institutions, on the costs associated with providing public and private sector goods and services.

Q. And could you just briefly describe what your responsibilities were in your public sector employment that we went through earlier?
A. The Governor's Council on Economic Advisors, the responsibility there was developing and directing the Governor's staff on a forecasting model that forecasted tax revenues for the state on a quarterly basis. The President's Council on Economic Advisors had a very varied portfolio all the way from Japanese trade to an analysis of the cost structure of the public power systems in the Southwest, the whole host of issues associated with public lands, foreign currency markets -- basically anything that they needed someone to look at quickly and get staff on it I dealt with those things. So it was really quite a broad spectrum.

Most anything in the Applied Economics area fell on the desk at sometime or another I would say during that period of time. The Joint Economic Committee really the same would apply, very broad responsibilities.

Q. And the Presidential Task Force on Economic Justice?
A. Well, the Presidential Task Force is very narrowly focused because it was formed, it was an amendment to the [364]Foreign Aid bill alleged here that mandated that this be formed, and the primary focus of it is to look at what are called ESOP's, employee stock ownership plans, as a mechanism for promoting American

foreign policy in Central America and the Caribbean Basin. So that one is very narrowly focused.

Q. Are all of the various appointments listed on the plaintiffs' 604 academic in nature or some concerned with practical applications of economics?
A. Well, some of the ones actually I just gave you I would consider practical applications in the public policy arena. However, I have and still do have private sector affiliations. For several years I was a chief economic advisor to Binion and Son (ph.) in London, and the work there was all costing work related to public sector, in most cases regional water authorities, what their cost structure was, what rates they should be charging for water producing.

Most recently, something that isn't listed on this exhibit -- I have 604 -- I have been recently named as Chief Economist for Friedberg Mercantile (ph.) -- excuse me -- not Friedberg Mercantile Group. Friedberg Commodity Management Corporation (ph.). We have two separate units. They are corporate entities. And also, the director, something called World Advisory Services which is a division of Friedberg Commodity Management, Inc. And both of those are located in Toronto. Their primary focus there is analysis of [365]currency markets, that is, our primary trading activities, and some other commodities, the primary one being crude oil.

Q. Have you specialized in any particular aspects of economics during your career?
A. Generically I would say that Applied Economics as my title implies would kind of cover everything. However, my career has kind of two segments there. One is what I call the public sector analysis, and in that regard I have done a considerable amount of work on cost analysis and investment feasibility for public sector entities, nationalized industries all the way down to local public services like water supply, and garbage collection, and that sort of thing.

The other side would be the private sector applications, and as I indicated that has been primarily in currencies and commodi-

ties analysis, the analysis of currency and commodities markets, and to some extent investment feasibility also.

Q. Have you published any subjects -- I am sorry -- any works on the subjects of economic costs analysis, regulatory service fees?
A. Yes, I have.

Q. And those would be listed in plaintiffs' 604?
A. Yes, those are listed through 1983 on the exhibit I have. Page 13 is the last page, and 83 is the last year of publications.

* * * *

[366]Q. Have you testified before as an expert witness?
A. Yes, I have.

Q. What are the types of cases in which you have testified as an expert?
A. One class of cases would be public utility rate cases before public service commissions. Another type would be valuation cases, and in most cases those are either tort or contract disputes of some sort.
[367]And then that would be it. I have testified before Congress, but not as a --

Q. Did you apply labor economics in any of the cases that you have testified as an expert witness?
A. Well, most of the tort cases are actually personal injury cases, and you have to get into the labor economics and the analysis of labor markets to determine what the wages and salaries and benefits would have been with and without the tort. So that, yes.

Q. Did you testify for any particular side on those types of cases? Are you a plaintiff's witness or a defendant's witness?

* * * *

THE WITNESS: I roughly split it 50-50, although in one particular short period of time, for example, a year it might have been 75 defense. But over the long pull about half and half.

BY MR. LAJEUNESSE:
Q. Have you ever prior to this case been paid by the National Right to Work Legal Defense Foundation for any work?
A. No.

[368]Q. Have you ever been paid by the National Right to Work Committee?
A. No.

Q. Have you read the decision of the United States Supreme Court in Abood v. Detroit Board of Education?
A. Yes.

Q. Have you read the decision of the Supreme Court in Ellis v. Railway Clerks?
A. Yes.

Q. Have you read the pretrial order setting forth the issues in this case?
A. Yes.

Q. You understand what I am talking about when I talk about the line drawing issue in this case?
A. Yes, I do.

* * * *

[378] THE COURT: The record I think contains sufficiently the issue before the Court. During the recess I looked at the case cited to me by the defendants, United States v. Marabellas, M-a-r-a-b-e-l-l-a-s -- that is a Ninth Circuit decision in 1984, I think cited correctly at 724 F.2d 1374.

I also reread several times the proposed finding of fact 44 on page 28 of the plaintiffs' findings of fact and conclusions of law,

and thought some about the testimony I have already heard in the trial, [379]particularly Mr. Culver. It is my conclusion that the objection to the testimony should be overruled.

The objection has some merit. It seems to me that the objection goes to the weight I should give the testimony of Mr. Hanke and not to, and not to the testimony that he is about to give -- realizing that it is within my discretion to make that determination unless I make a clear error in making the determination. It is clear that Mr. Hanke's background -- in the first place, it is obviously clear that Mr. Hanke is clearly qualified as an expert witness in matters economic, particularly in Applied Economics. His vita speaks for itself, and there is no question about that.

The narrow issue is with regard to the existing state of the law in labor relations, and both in Michigan and in the United States, and more particularly in the United States -- and given the witness' admitted lack of knowledge about the so-called collectivity that is inherent in union work, and, possibly, the MERC decision in Michigan, whether he should be allowed to testify, and given the fact that his calculation of shared and joint costs in the past has largely had to do with regulatory agencies and not with the issue before the Court; and the Court understands that. I think that probably in large part is what the objection was all about in the first place.

[380] But I am convinced that he should be permitted to testify as an expert. I have to decide ultimately, particularly with regard to the key decisions and the MERC case that has been cited to me by everybody.

* * * *

[382][THE COURT:] Of what weight and need to put on his testimony with regard to the testimony Mr. Culver and others have already given, I think I am capable of doing that. The objection, therefore, is, the objection to his continued testimony on economic matters is overruled.

* * * *

[384]Q. Mr. Hanke, do you know what an agency shop service fee is?

A. Yes.

Q. Could you describe it?

A. Well, there are costs that are so-called chargeable, and others non-chargeable, and the agency shop is based on those costs that are chargeable.

Q. Is the problem of the methodology of separating chargeable from non-chargeable costs similar to any other problems with which you have experience?

A. They are very similar to all of the situations of public utility regulation and public utility rate-making, and also user fee computations for the delivery of, pricing of the delivery of public services. However, there is one difference between the user fee calculation and the public utility rate calculation vis-a-vis the union situation and the agency fee, and that is that with public utility rates or user calculations the customer is in a voluntary, has a voluntary relationship with the public entity that is providing the service.

In other words, if a public utility company [385]charges so much per kilowatt-hour, you can decide whether you want to turn the power on or not and just walk away from the service being offered. That isn't an option in the agency fee situation, and that leads to a fundamental economic analytical problem, and that is, with the agency fee situation you have no direct or indirect method by which you can evaluate benefits being received by the individual who is paying, who is being forced to pay the agency fee, whatever it may be.

Whereas, with a public utility or a user fee situation, a customer since he can walk away, and it is a voluntary relationship, there are methods for calculating benefits received by the user of that public service. And that is a very major distinction in my view between the agency fee versus the public utility. Everything else would be the same with the exception of the coercive versus voluntary components.

Q. Does that difference affect the economic analysis of the methodology in determining the fee?
A. I don't think that it should affect the overall methodology in costing and computing the fee. However, I think that it means that the degree of care with which one does a computation in the union situation should even be greater than in a public utility situation because ultimately in the public utility situation the customer doesn't have to turn the switch [386]on, basically, and since you do have to turn the switch on, so to speak, in the union situation the computation of costs should be done with extreme care and caution.

Q. You have explained in some detail the differences between or the difference between calculating a service fee and user fee or regulatory fee, but you didn't really say how they are the same. Could you explain that?
A. They are the same in the sense that what a public utility rate is attempting to do is simulate what would happen in a competitive market environment. So you are trying to compute the costs that the individual customer would impose by taking whatever the action is to consume that he is taking; in other words, you want to get a direct causal link between the customer and the impact that he is having on the utility and charge him for that. And that is what would happen in a market situation.

So you are attempting to simulate the market when you don't have one in a publicly owned utility situation. Now that to me is precisely what you are attempting to do with the agency fee situation. You are trying to compute the cost imposed on the collective bargaining unit by the nonmembers and charge them for that. And the reason that you want to do it is not only to, as I mentioned, simulate the market, but you want to put the union members and the non-union members in a situation where neither group is subsidizing the other [387]group.

Q. What is your experience as to how the utility rates are calculated, user fees?
A. There is a wide variation on these. In what I would call the more progressive states the computation is based on direct causal

linkage between use and costs. The so-called marginal cost approach to rate-making.

And what I mean by progressive states, you find this is in Wisconsin, California, New York, Illinois. Ah, some states like New Mexico aren't necessarily known as progressive states, but having commissioners that are individually, shall be say, are enlightened and trying to get this direct causal linkage. So, like, New Mexico would require these marginal cost analyses also.

And then the other kinds of generic group, there are in fact many states that, in which rate-making is what I would determine highly politicized, and there is not the necessary economic causal link between use and cost and rates based on cost.

* * * *

Q. You say highly political. What is the process by which the rates are determined in those states?
[388]A. Well, in all states there is a rate commission, a public utility rate commission that will hear the case. And all I am saying is that in the progressive states marginal costs analysis with its direct linkage and cost-based pricing is in fact required. The commissioner must receive for a case to go forward a cost-based analysis which has this direct linkage in it.

In other states, you may or may not. I mean, it just depends. It is a varying thing, and to some extent one reason that this happens, it is staffing also. I would characterize the staffs in the progressive states as being highly trained professionals relative to the other states.

Q. Is there economic literature supporting a methodology utilized in the so-called professional -- (interruption)

MR. SCHMEDLEN: Objection, hearsay.

THE COURT: Sustained.

MR. LAJEUNESSE: I believe that the expert may state hearsay as the basis of his testimony.

THE COURT: Yes, you are right. If that is the basis of your testimony, I am wrong about sustaining.

MR SCHMEDLEN: I will withdraw the objection if that is the basis of the testimony.

THE WITNESS: There is indeed a large professional literature on cost-based pricing.

[389] THE COURT: And that is in part what you base your opinion on?

THE WITNESS: Yes, it is.

BY MR. LAJEUNESSE:
Q. Have you reviewed defendants' Exhibit No. G and defendants' Exhibit No. K, which are tabbed in that book of defendants' exhibits in front of you, prior to testifying today?
A. Exhibit G, yes.

Q. "G" is the Michigan Education Association reduced fee calculation?
A. "G," the answer is yes.

Q. And "K" is the National Education Rebate --

MR. SCHMEDLEN: Your Honor, I will stipulate that we use the average cost system as the Court heard through the witnesses if that will save time.

THE COURT: It may save time. He hasn't got it down to indicate whether he has looked at "K."

THE WITNESS: I have looked at it.

BY MR. LAJEUNESSE:
Q. How would you describe the methodology used? Well, first of all, let me ask the first question. Is the methodology used in those two exhibits the same in your opinion as an economist?

A. Yes.

[390]Q. How would you describe in your opinion as an economist the methodology utilized in those two calculations?
A. The methodology would be the residual costing and the residual pricing method.

Q. What do you mean by that?
A. What I mean, a total cost was given, and then the non-chargeable items were identified and subtracted from that total, and it was assumed that the residual was in fact all chargeable, and the fee based then on the average of that.

Q. In your professional opinion as an economist, does that method of calculating the fee have any basis in economic theory or practice?
A. No, it does not have any basis in economic theory or in practice either in the private sector or public sector.

Q. And what methods are used in the private sector that this does not utilize?
A. Well, in both the private -- obviously in the private and also in the public, when user fees or public utility rates are charged, it is not a residual method that is used but, rather, a direct method in which you are attempting to figure out what the cost is imposed by the user so that you can set the price at that cost. And, and that is the approach that is used.

In other words, and in the private sector it obviously is. You don't use a residual approach. If you [391]go to a gas station to buy a tire, he looks in his book of what the cost of the tire was, and he has his markup, and he charges you. He doesn't figure out the total cost of his gas station, add up all of the revenues that he gets from tires, and then figures out how much he is going to charge you for a tire.

Q. Is the direct cost method more rational from an economic standpoint?
A. It is not only more rational, but it is the only method that is used in economic analysis.

Q. Why?
A. Because economic analysis of markets by definition has to use that approach because that is what people in the markets do. They directly see what the costs imposed are and set their pricing policies based on those causal linkages. In the public sector when pricing is used, and I say when pricing is used because in many cases there aren't fees or user fees, but when there are fees or prices charged, there is an attempt to figure out what the linkage is between the user, the costs that he imposes, and then the price that will be charged to that user for imposing those costs on the public system.

Q. In your professional opinion, is the direct pricing or direct costing method more likely to avoid the risk in the service fee situation that nonmembers might be subsidizing [392]non-chargeable costs?
A. Absolutely.

Q. Assume, Mr. Hanke, that the justification for the service fee is to ensure that nonmembers pay their fair share of the costs of the statutory functions of a union as their exclusive representative. Then also assume that that requirement which I have just described is economically rational. Do you understand the assumptions?
A. Yes.

Q. Given those two assumptions, in your opinion as an economist is the following standard consistent with economic theory and practice? Quote: "Employees such as petitioners object to being burdened with particular union expenditures. The test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employers on labor management issues. Under this standard objecting employees may be compelled to pay their fair share of not only the direct cost of negotiating and administrating collective contract(s) and settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the

union as exclusive representative of the employees in the bargaining unit." End quote.
[393] I understand that is a long question. Do you understand the question, Mr. Hanke?
A. I understood the quote, but what was the question again?

Q. Given the two assumptions, given the two assumptions that the justification for the service fee is ensuring that the nonmembers pay their fair share of the costs, of the statutory costs of the unions as their exclusive representative, and the second assumption that that justification is economically rational, does this quote that was just read, is this quote that I have just read consistent with economic theory and practice?

* * * *

[394] [THE COURT:] You may answer the question if you now can remember it after all that.

THE WITNESS: The answer is yes.

THE COURT: I also predicted your answer.

BY MR. LAJEUNESSE:
Q. Still operating under our two stated assumptions, that is, the justification for the service fee requiring the nonmember to pay his fair share of the statutory functions, exclusive representation, and the assumption that that is an economically rational justification, operating under those two assumptions, in your opinion as an economist, is it consistent with economic theory and practice to charge nonmembers for the costs of chargeable activities performed on behalf of other bargaining units?

MR. SCHMEDLEN: Same objection, Your Honor. I am sure you will rule the same way.

THE COURT: I will take the answer. That is, you may answer.

THE WITNESS: No.

BY MR. LAJEUNESSE:
[395]Q. Why not?
A. Precisely because you have the possibility, in fact indeed a high probability that various bargaining units will be cross-subsidizing each other, and that is the sole purpose of doing costing in public enterprises, to identify the costs imposed by those who are imposing the costs so that you can charge them fees, prices, rates, whatever you want to call them, so that if you -- if you are lumping other bargaining, all bargaining units together, or additional bargaining units, you are increasing the possibility that there will be cross-subsidization between the so-called bargaining units that you are lumping in.

* * * *

[396]Q. I am saying that -- I am saying does the averaging-across-bargaining-units method which was followed by the union here increase the risk that nonmembers will be compelled to subsidize non-chargeable activities?
A. Yes. With the way that they have done it here, yes.

* * * *

MR. LAJEUNESSE: Again, why is that sir?

THE COURT: The answer is obvious, isn't it?

THE WITNESS: That is always what I tell my students. But I am afraid that rules are a bit different. It is due to the fact that you are lumping together various units that are not necessarily related in the sense that they impose costs on the system in the same way or to the same degree. And the methodology of economics is, is to go down to the lowest unit, the individual in fact, figure out what costs he is imposing, and charge those prices. That is what actually happens in a market.

BY MR. LAJEUNESSE:
Q. But we can't do that here.
A. Okay. We can't do that here. The question is, you want to keep the unit as small as you possibly can so that you can [397]make the proper identification with the individuals imposing the costs so that you can charge them.

Q. Two final questions. What is your opinion as an economist of the theory that bargaining expenses in other units are related to the duties of the union as exclusive representative of the employees, in this case the Ferris bargaining unit, because they set a pattern for bargaining which makes bargaining easier on behalf of the Ferris employees?

MR. SCHMEDLEN: Objection, Your Honor. That is not in controversy. It is stipulated in the pretrial statement that that relationship occurs, and so it is just not a point that is relevant.

THE COURT: I did not believe it was in controversy, either.

MR. LAJEUNESSE: My question, Your Honor, is not whether the theory exists. My question is whether -- this is an impact question -- whether there is an impact economically that has any, ah, relationship to the methodology of determining the fee.

THE COURT: I am going to let him answer in the interest of time, please.

THE WITNESS: I would say that that is a, a hypothesis, but it hasn't met the test that, I don't see any empirical evidence. It is an interesting hypothesis [398]that you get stage one in some plane, place as a chain reaction, and it does have effects on down the line; but it is something that would have to be scrutinized and tested empirically. So my answer is I don't know. It is a hypothesis that has to be tested, and I don't know what the answer is.

I can only speculate in the sense that there is a lot of literature in labor economics indicating that, that even the union versus non-union wage differentials are virtually nonexistent.

So it is a question -- it is questionable whether unions have any effect on wages. So if you take that back to this hypothesis, whether bargaining in one unit ultimately affects bargaining and wages on down the line, I would suspect that given what we know about wages in union versus non-union comparables -- my guess is the evidence won't support the hypothesis. But I don't know unless I see the evidence.

THE COURT: It would be hard, wouldn't it, to do the kind of empirical study that you as an economist would want to do about that question? For instance --

THE WITNESS: It would be a difficult test.

THE COURT: For instance, some of the things that you haven't heard here in all of this trial -- this trial started after the birth of Adam shortly or after the birth [399]of Eve, one of the two. But there are some things hard for me to quantify. For example, and by way of this small example, what a person who has collective bargaining responsibilities does vis-a-vis putting out a dinner for a politician, does that have any economic value in the collective bargaining sense to someone way down the line? I don't know how you could test that empirically.

THE WITNESS: Your Honor, it would be an extremely difficult test. There is no question about that.

Let's turn the question around. But, you are looking at the question in terms of their alleged benefits, and the question is, number one, are there real benefits, and then whom do they ultimately rest with.

Turn the question around, and let's at the extreme assume that the Ferris unit just disappeared off the face of the earth, and look at it from a cost point of view. What costs would be avoided if that disappearance occurred?

And that is how the economist comes at the cost-based pricing. So if you turn the question around, instead of always

trying to focus on benefits, and where they are if they exist, whom they rest with, turn the thing around and say if we do away with the Ferris bargaining unit what costs would be avoided by MEA and NEA, and that is how you approach the cost-based analysis and come at the cost pool, so-called cost pool issue.

* * * *

[405]Q. And wouldn't you agree that this applies equally well to your testimony here today, that different economists with different political views could reach different conclusions on the questions that Mr. LaJeunesse asked you?
A. I would respond by saying that the great bulk of the economics profession, professionals in the economics profession, as well as the literature and refereed journals in the field would agree with the statements that I made with regard to the questions that were asked by plaintiff's counsel.

You could perhaps find some economists who wouldn't agree with those, but in the broad outlines -- and what I am here to talk about is only broad outlines or methodology, and it is relevant in figuring out agency fees -- I would find it, I can't imagine any economist who would disagree, no. You can't find anything in the literature, either.

Q. I was just going to ask you that. Out of this great bulk of economists, no one has written on the subject at issue in this case dealing with how is the most appropriate way to allocate agency fees, correct, to your knowledge?
A. Ah, to my knowledge I haven't seen it directly addressed.

Q. And you mentioned that administrative feasibility, to do the kind of studies that you were talking about at the end of the direct, where you said you wanted to keep the group small. Wouldn't you agree with the following? That if you [406]have 50 different agency fee objectors in 50 different bargaining units, you would have to do 50 different tests to apply your theory?
A. That is true. But you fail to put in that where it is administratively feasible or economically feasible. And what we are talking about here is isolating this bargaining unit that we are

talking about at Ferris, and it is quite simple to figure out what the total costs, total avoidable costs to that unit would be, by hypothetically removing Ferris and seeing what costs are avoided. And this type of thing could be done with great ease.

Then if you get into the little micro adjustments down to the individual union member, that is where you would have a problem with the extension of this.

* * * *

[412]Q. Do you agree that in setting regulatory rates that cost benefits analysis has an appropriate place?
A. It has an appropriate place in terms of making investment decisions, but not pricing decisions. Benefit cost analysis is a, is relevant at the investment stage in the public sector.

What is relevant in the allocative stage is the pricing.

* * * *

[413]Q. Mr. Schmedlen asked you some questions about average costing and the utility rate-making area. In your experience those average costs were based on actual data. Is that correct?
A. Absolutely, yes.

Q. Are there other economists who agree with your views on the various subjects quoted to you by Mr. Schmedlen?

MR. SCHMEDLEN: Objection, Your Honor, hearsay.

THE COURT: It is hearsay. One can argue, I suppose that that bolsters his own opinion. So I overrule it. You may answer it.

[414] THE WITNESS: If indicated by articles and referee journals. The answer is yes.

* * * *

Q. To what would you look in making that cost benefit analysis that Mr. Schmedlen was asking you about at the end of his cross?
A. Okay. Your Honor, what I think I would do in my judgment would be to, to look at the cost benefit at two levels. One is at the cost pool level. That is the avoidable cost. Hypothetically, do away with Ferris, and see what costs are avoided. I think that kind of computation can be done at a very low cost, and obviously the benefits of doing so would be quite high relative to those costs.

Then you get down to pushing this logic down [415]to the individual nonmember. In that case the costs rise exponentially, and I am really not quite certain what the benefits are because as I have testified earlier no one knows what the benefits are, because you have this coercive system.

You don't have a voluntary arrangement where you get feedback from the individual consumer about what his benefits cost calculation is.

So we have very little guidance down at the individual level. I think we have a pretty good handle or could have a fairly good handle on the cost pooling level, but not the individual level. That would be kind of my quick reaction to that.

THE COURT: Do you, is it your testimony that the cost incurred by the union on behalf of the agency fee payors is on a marginal cost basis?

THE WITNESS: No, not at the individual level. In other words, here is a two-stage thing. What you are doing is, you are computing marginal -- avoidable costs or marginal -- at the cost pool level. Okay. And then what you are doing is after you have everything that should be in the cost pool, separate out chargeable, non-chargeable, and just average.

So in fact it is kind of a hybrid thing where you have an avoidable cost analysis, getting on down to the cost pool, the appropriate cost pool, in this case Ferris bargaining unit, and then knocking out any non-chargeables -- [416]excuse me. Excuse me -- adding the chargeables up, adding the chargeables up, which might not include everything, and then dividing by the number of

members so that you have an average fee based on those chargeables that you have added up.

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TRIAL TRANSCRIPT, VOL. III,
TESTIMONY OF JAMILLE WEBSTER
Jan. 15, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

[Title omitted in printing]

* * * *

[424]Q. Beginning with 1975, would you tell the Court the different positions that you have held with the MEA and the duties of those positions?
A. Yes. I entered into the Professional Development and [425]Human Rights department at MEA in 1975. My job assignment was research. And I held that position for 10 years until 1985 when I was appointed to my present position which is associate executive director for one of the MEA's major divisions called Program Services Division.

* * * *

[451]Q. Can you tell me whether you believe the staff could keep a time sheet which could identify whether their activity was chargeable or non-chargeable and identify the bargaining unit to which the work was directed?

* * * *

THE WITNESS: No, I do not think it is feasible or practical. The activities that we involve ourselves in are complex

and very diverse. We are involved in designing programs. We are involved in developing training packages. And as a part of that process we are consulting with the PDHR consultants, consulting with the research consultants.

We might be reviewing contracts, and the complexity of the activity would be hard to isolate some piece of that activity that is one type or the other. It is a, I don't believe that it is feasible.

BY MR. GREELEY:
Q. Do you believe that you could identify an activity to a specific bargaining unit?
[452]A. Well, that is not easy to do, either. Much of what we do has a statewide significance. Whether it is the leadership level on the part of the PDHR consultant, or Professional Excellence, of Human Rights, much of our material, our training packages, have a statewide focus.

On those occasions when we are called in by a local we then may have to develop something specifically for them, but we do both the unique and as well as the statewide kind of development of programs and training packages.

* * * *

[470]Q. A laid-off member is no longer in the bargaining unit. Is that correct?
A. That is right. But members.

* * * *

TRIAL TRANSCRIPT,
TESTIMONY OF ROBERT K. MARSHALL
Jan. 16, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

[Title omitted in printing]

* * * *

[3]Q. Mr. Marshall, where are you employed?
A. The Michigan Education Association.

* * * *

Q. What is your present position with the Michigan Education [4]Association?
A. I am the associate executive director for UniServ.

* * * *

[22]Q. You described the rationale for getting involved in support staff. Could you briefly describe then what actually then was accomplished on that subject in the Jackson area?
A. Yes. I started the organizing of the support staff in Jackson County with a support staff unit in, in Hanover-Horton.

Since the development of that, we believe that we have been, we believe that what I just explained has [23]worked, that the perception that there is a viable strike available to the employees has caused bargaining to improve from our standpoint, and to give us relatively more power at the bargaining table.

As a result of exploring and implementing, actually initiating the notion of expanding MEA membership to ultimately include support staff members, all non-supervisory employees in a particular district, MEA then developed a task force to develop, to explore this approach that we are using in Jackson County, ultimately created MEAO, which was a kind of a pilot project to organize support staff in Michigan -- which was Michigan Education Affiliates Organization, then became MESPA, which subsequently has become, the support staff members have become full active members of MEA rather than an affiliate organization.

* * * *

[27]Q. You have described the resistance level on how it changed as some of the results started coming in on this. What

was the position that you took in 1979, the end point of your being the zone two organizer?
A. Okay. I became the director of Organizing and Bargaining in MESPA. That position had only existed for a few months prior to me moving into it, and it was held by Larry Diebold, D-i-e-b-o-l-d, prior to my taking it.

Q. What was the purpose of the creation of this new position if you know?
A. The position was created to supervise our bargaining consultants to, ah, coordinate and supervise our organizing efforts, and also to serve as a, a, the administrator of MESPA which was then a, an, an affiliated organization with MEA.
[28] We have used the term "associated to," and we used the term interchangeably, but to differentiate between MEA being an affiliate of NEA, we called MESPA an associate, associate of MEA. I know it is confusing, but they are technically associated organizations.

Q. What does the acronym MESPA stand for?
A. Michigan Education Support Personnel Association.

* * * *

[33]Q. Did the MESPA organized support staff have the same new structure as MEA?
A. No, they didn't. They had a new structure based upon, at that time based upon hours worked. So because of the different types of employees that you are dealing with, the dues structures if they were full-time it was one amount, full-time meaning 30 hours or more a week. They worked from 20 to 30 hours a week, that meant 75 percent dues, so forth.

* * * *

[50]Q. Mr. Marshall, there has been a fair amount of testimony in this case dealing with the feasibility of time sheets that would both allocate all of the work of UniServ directors to either

chargeable or non-chargeable, and then further allocate it to particular bargaining units.

Based upon your experience as somebody, someone who has been both UniServ director and a supervisor of UniServ directors, could you tell the Court whether you think that is possible, separate from whether or not it is something that you agree or disagree with?
A. I believe it is virtually impossible.

* * * *

[61]Q. Mr. Marshall, you were the director of the MEA Department of Organizing and Bargaining for most of 1981-82. Is that correct?
A. You are three-fourths correct.

Q. And during that fiscal year, the Department of Organizing and Bargaining had three components, organizing, bargaining, [62]and higher education. Is that correct?
A. Yes, the higher ed coordinator, Art Rice (ph.sp.) was assigned to me. I was his supervisor.

* * * *

[81] MR. LAJEUNESSE: Your Honor, I have handed the [82]witness what is marked for identification as plaintiffs' Exhibit 625. I am sorry. I picked up something. I already had the one that I wanted. 627. I will also provide a copy to the Court. That was in the exhibit list as defendants' "Q." Could you examine plaintiffs' 627, Mr. Marshall, identify it for the record?

THE WITNESS: All of it?

BY MR. LAJEUNESSE:
Q. I think the exhibits are all of the same -- this is a composite exhibit containing memos of all of the same nature. I think that you will quickly see that.
A. Well, they are all weekly reports to Chuck Williams who was at that time my boss, from either me or Eric Hansen, who was

one of the organizers working for me, or memos to me relative to those reports from somebody who was working for me.

MR. LAJEUNESSE: Your Honor, I move that plaintiffs' 627 be admitted.

* * * *

THE COURT: I don't know. I will receive them.

* * * *

[83] THE COURT: It does appear to be a separate memorandum, and is a separate memorandum, but isn't attached in mine. But it doesn't make any difference. They are all weekly reports. I will receive them.

* * * *

[98]Q. The functions of the higher education component of organizing and bargaining included providing higher education local associations with specialized services and staff coordination concerning negotiations. Is that correct?
A. Yes.

Q. Also included providing local associations in higher education with specialized services and staff coordination concerning lobbying. Is that correct?
[99]A. Yes.

Q. And, finally, in terms of general categories, it provided higher education local associations with specialized services and staff coordinations concerning research. Is that correct?
A. Yes, I believe so.

Q. I believe you testified that Art Rice was the higher education coordinator in 1981-82?
A. That is correct.

Q. Did his activities in 1981-82 include among other things the coordination of the Preserve Public Education program with regard to higher education?
A. I believe so.

Q. And in association with that he also delivered the message of the MEA to the local associations in higher education that they should participate in the election 1982 program. Is that correct?
A. I don't know that.

MR. SCHMEDLEN: If you want to propose a stipulation it may save time, Mr. LaJeunesse. I don't know what you mean by the election '82 program.

MR. LAJEUNESSE: I think other documents show what the election '82 program was. If you want to stipulate that at the March 3, 1982 meeting of the Thirteen-E coordinating council Mr. Rice spoke on political involvement and importance of every teacher becoming politically active, and stressed that [100]we must be involved in political activity at all levels for election '82, election '82 being in capital letters -- do I have a stipulation?

MR. SCHMEDLEN: Your Honor, if Mr. LaJeunessse includes the sentence that follows where he left off, says there must be additional revenues for higher education, I will stipulate to that whole thing being in the minutes of the coordinating council.

MR. LAJEUNESSE: Fine.

THE COURT: Done. I take it Election '82 simply means the election year 1982?

MR. LAJEUNESSE: Your Honor, I believe that the documents show that that was the specific program of the union.

THE COURT: I am talking about simply what Election '82 means.

BY MR. LAJEUNESSE:
Q. Mr. Rice also administered what we have, in many of those acronyms, referred to as MAHE. Is that correct?
A. Dr. Rice was the staff liaison with MAHE.

Q. That was the Association of Higher Education Members of the MEA. Is that correct?
A. Yes. Basically, an internal caucus within the organization.

Q. Why did the higher education locals need a separate [101]association, a separate office, and a separate association?
A. Because the higher education units were, which are served through UniServ, are located all over the state and have some unique needs and concerns that weren't being addressed totally in the various field locations.

So we created a position called higher education coordinator to deal with those concerns and those needs from a Lansing based operation and work involved.

* * * *

Q. I will add to that. I will state it. Higher education is a very specialized field requiring specialized staff and expertise for the purposes of representation by the Michigan Education Association?
A. Yes and no. Many of their needs are not unique and not specialized. They do have some unique special needs. And because they do have some that are unique, we provide some unique special staff help.

By and large, the needs around at the table [102]bargaining and grievance processing locally is not a particularly specialized need, specialized situation. But their funding is different than K-12, and we need to deal with funding needs for higher education as a specialty of the entire educational arena.

* * * *

[106] THE COURT: Maybe, maybe. The objection is overruled. Is it true that higher education units compete with each other for students but K-12 public education units do not?

THE WITNESS: The first half is definitely true. The second half of the statement is almost always true. There are some forms of competition for students among public schools.

* * * *

[107]Q. Was that distinction between higher education and K-12 education one of the reasons that were expressed by members -- restate the question. Was that distinction between higher education and K through 12 a reason for resistance among higher education members of the MEA to participate in multi-association bargaining organizations?
A. That may have been a reason that higher education members, a MAHE member or a MAHE leader, might have stated. It is not my perception that that would have been the, the significant reason why they didn't participate as much in multiple association bargaining organization, MABO's, unified bargaining. Well, I can't say MABO without telling you what it means.

THE COURT: I want you to do that. Do you have a maybe as well as a MABO that you can tell me about?

THE WITNESS: I don't believe so, but maybe. I believe the primary reason was a sense of elitism.

THE COURT: Elitism.

BY MR. LAJEUNESSE:
Q. Mr. Marshall, higher education members of the Michigan Education Association were often reluctant to participate in MABO's because their interests are different from those of K through 12 units. Is that correct?
[108]A. The higher education leaders preferred to have a MABO of higher education units, and worked for some time to achieve that because they felt that they needed to coordinate

their activities statewide in bargaining. That was not successful, and as that approach wasn't successful many of them have worked with the MABO's in their area, around setting bargaining standards and so forth.

But there was -- they just felt as though they would be better off in a MABO involving higher education units, but weren't able to get such a thing going.

Q. Did they in fact express concern about participating in MABO's at all in 1981-82? Didn't they resist it?
A. In local coordinating council MABO's?

Q. That is correct.
A. I imagine quite a number of places in the state that is true, yes. And in Jackson County, the Jackson County Community College was quite interested in working with the Jackson County MABO. So they would have had a different point of view.

* * * *

[110]Q. For higher education institutions. Where does their money come from the college and the university spent? You are familiar with the sources of those monies spent.
A. Other than the fact that I know that the state has a separate higher education appropriation bill and allocates funds to higher education, I have very little personal familiarity with the funding of the institutions, personally.

* * * *

Q. Does the Michigan legislature play any part in the [111]negotiation of collective bargaining agreements in higher education?
A. Yes. Indirectly. They provide the funds.

Q. But they play no direct part in the negotiations?
A. The legislature?

Q. Of the agreements? Yes.

A. The at-the-table-bargaining process does not have a representative in the legislature physically present. That is true; but what is bargaining? They are greatly controlled by the legislature.

Q. You also -- you also agree -- I am sorry. Let me rephrase the question. The legislature plays no part in the ratification of the contract in higher education. Is that correct?
A. The Board of Trustees and the union.

* * * *

[112]Q. Are the funds of Ferris State College derived in part from tuition?
A. I assume so.

* * * *

Q. Did any of the statewide ballot issues on which the MEA has campaigned have any relationship to the contract at Ferris State College other than the relationship of having an impact on the pool of funds available by the legislature to appropriate for higher education?
A. The ballot issue as I recall related to funding. I am trying to think -- Smith-Bullard.

Q. I am saying, do they have any relationship other than the funding, anything more direct than that?
[113]A. I am, I am trying to recall what ballot issues there have been. Parochiad issue would have had, could have or would have had an impact. I don't -- I don't know. Yes, I would assume it would because it would make it possible for public funds to go to private schools. That would have an impact.

Q. That is funding. I am looking for something other than funding. I mean direct relationship.
A. I don't recall other ballot issues that were outside of the scope of funding. I think most of them dealt with that.

* * * *

Q. The question was whether funds which the state legislature authorizes and appropriates for higher education institutions are earmarked for the payment of certain items, i.e., salaries and benefits under the institution's collective bargaining [114]contract?
A. I don't know.

Q. You don't know that --
A. I don't know.

Q. That they are appropriated for the general purposes of a higher education institution?
A. I assume that, but I don't know that. I have never seen the receipt of the money sent from the state. I haven't ever examined the categoricals to see if there was any correlation.

Q. You have never heard of a case, you don't know of a case where the legislature has passed a bill saying these funds are appropriated to pay the salaries of the teachers under "x" college?
A. The reason that I say that --

Q. It is for general funding?
A. It is like Michigan's lottery fund. Michigan's lottery money is all designated for education. That doesn't really mean that this money really goes there. It just means that at least that much out of the general funds has got to go there. I don't know if there are any provisions in the way that the higher ed or ed act is written to allocate a certain percentage or not.

* * * *

[115]Q. MESPA was a separate union in 1981-82. Is that correct?

MR. SCHMEDLEN: Your Honor, I think that calls for a, such a confusing legal issue, that if he wants to ask factually what the relationship is -- but that really gets complicated, and I don't think it is helpful.

MR. LAJEUNESSE: It was separately incorporated in 1981-82. Is that correct?

THE WITNESS: That is correct.

BY MR. LAJEUNESSE:
Q. Did the Professional Excellence Services of the Program [116]Development and Human Relations Department have applicability to MESPA bargaining units?
A. Which part? Professional Excellence?

Q. Professional Excellence?
A. Ah, no, not to any significant degree.

Q. The Teacher Outplacement Program had no applicability to --
A. No, we didn't have a bus driver on placement service or anything like that.

Q. The services of the higher education coordinator had no applicability to MESPA units. Is that correct?
A. No, not true. Higher ed, we had ESP units in higher ed. Higher ed coordinator would have been concerned with all of our members.

Q. Is there a difference between the kinds of issues that are bargained in teacher units and those bargained in support personnel units?
A. Yes, there are some differences and some similarities.

* * * *

Q. Do you remember testifying at the Bridgeport-Spaulding hearing?
A. Yes.

[117]Q. Do you remember testifying that the difference between the kinds of issues that are bargained in teacher units or faculty units and support personnel is quite significant?
A. I think that I testified that there are some issues bargained in the support staff unit that are dramatically different than teacher contracts, but I don't believe that I testified that the whole collective bargaining agreement is totally different.

I think that I used an example of hours where when teachers were on a salary schedule, and with other types of bus drivers or custodians or aides were on an hourly rate, they are dramatically different. So there are issues that are significantly different.

* * * *

[120]Q. Did you say at that hearing that the passage of millage is, quote, not a union management issue, it is a school community issue, end quote?
A. I would have -- I may have said those words, and I would like to see the context in which I said them.

Q. I am showing the witness a transcript of the proceedings, volume five in the Bridgeport-Spaulding cause. Mr. Marshall's testimony resumes on page three through page 103. Here on page 89, that is the statement that I had reference to, Mr. Marshall.

* * * *

[121]Q. Did you testify as I have stated?
A. Did those words appear? It says millage is a source of one of the -- do you think that rapport had any effect on your ability to adjust to grievance -- I was demonstrating at the time --

Q. Just answer the question, Mr. Marshall. Did you make the statement which appears here?
A. Absolutely. Millage is a source, one of the major sources, and in some districts almost a total source of revenue, and (reading) it is in everybody's self-interest in a school district to get an appropriate millage passed. That is not a union management

issue. It is a school community issue of trying to get funds to operate the district.

Q. Thank you. That is all we --
A. Noticing the nature of the cooperation --

Q. You did make that statement?
A. Yes, it is in the transcript there.

* * * *

[122]Q. Does the settlement of an issue in bargaining in a bargaining unit not represented by the MEA on occasion set a pattern for the MEA units?

[Colloquy of counsel and court concerning overruled objection omitted in printing]

[123]A. It couldn't set a pattern by itself if isolated, but it could affect the outcome, especially -- it would also depend upon when it was settled. If it was like in an area where there is only one AFT unit in the entire three-county area, and they are all by themselves, and they settle first and low, they could affect the MEA unit.

If it happened late and most of our pattern was already settled, and it came in different, then it might not have any effect at that time.

* * * *

TRIAL TRANSCRIPT, VOL. III,
TESTIMONY OF BARRY HAWTHORNE
Jan. 17, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

[Title omitted in printing]

* * * *

[538]Q. Mr. Hawthorne, where are you employed?
A. I am the executive director of the Private Industry Corporation of Wayne County.

Q. Have you ever had employment in the labor relations area on behalf of a labor union?
A. Yes, sir.

Q. Would you briefly describe that experience and the [539]approximate time frame?
A. Yes, sir. I was an international representative for Service Employees International Union representing Wayne County Sheriffs Deputies Local 502 as well as other police unions for the Service Employees Union for approximately a year, just about a year, year and one-half in the mid 70's.

Q. Have you ever worked in the public sector labor relations arena on behalf of a public employer?
A. Yes, I have. I worked for approximately a year, year and one-half as a labor relations analyst for the Wayne County Labor Relations Board which is charged with administering labor relations for Wayne County government.

Q. Have you ever worked for a neutral state agency involved in labor relations?
A. Yes, sir. I have had two and one-half years of direct experience as acting director of the Bureau of Employment Relations, Michigan Employment Relations Commission, from October, 1980 through April of 1983.

* * * *

[540]Q. Just to make sure that I am clear on this, did you hold more than one title within MERC during the time that you were employed there?

A. Yes, yes, sir. I served as deputy labor director for the State of Michigan for approximately five years from 1979 [541]through the, almost completion of 1983. I served in that capacity for two governors, both Governor Milliken and Governor Blanchard.

I also served in the capacity for three labor directors under, initially Pat Babcock who is currently director of the Mental Health for the state of Michigan, and then under a William Long who replaced Mr. Babcock. He is currently Public Service Commissioner for the state of Michigan, and S. Martin Taylor who is currently the executive director in Detroit.

• • • •

Q. Based upon that experience in the labor relations area that you have testified to, can you tell the Court whether there is something that you refer to as pattern bargaining or [542]pattern contract settlements?

A. Yes, sir. Pattern bargaining is, is where -- well, it has been recognized throughout the state for at least since I have been affiliated in the labor relations arena with, given, given a specific training to labor unions and management groups on a frequent basic, frequent basis. And it is both in the public and in the private, private sectors.

That is where you take a specific geographical area and a specific labor market that, that you look at the specific positions or classifications of which are being negotiated.

You also look at the types of communities, the similarity of geographical region, and that, that usually labor unions such as UAW, say, AFSCME, the Michigan Education Association of course, the Michigan Federation of Teachers, when approaching bargaining attempt to establish specific criteria based upon the labor market in which they are bargaining that is shared with all of the agencies or all of the respective labor unions within the particular area.

And goals and objectives are established for the bargaining unit. This is also very common on the public education management side as well as management in the whole of my experience with the private sector, where there are labor studies done in the specific area, and that information is shared within a specific

industry. Specific wages rates [543]are discussed as well as fringe benefits. So that an employer when they are approaching the bargaining table does so in the light of a fabric of the labor relations activity that is going on in a particular area.

• • • •

[544]Q. What I want you to describe for me if you would is the effect after this pattern contract is set, settled on, on other contracts that are negotiated by that same labor union or its affiliates.

A. Well, I think it does have an effect. For example, if, if well, we have had some cases on point specifically, and early, late 1979, early 80's, that the state went through an economic depression. We were having -- and that was being felt very much in the public sector in the budgets that were [545]coming out at the state and local levels. And then it meant that both management and labor had to take a serious look at the resources and allocate them to the best possible means. And in doing that, we looked specifically at the issues in specific labor relations agreements that were occurring throughout the state, looked carefully at fringe benefits. And mediators, for example, report on a regular basis that, the issues that are in dispute. They provide those reports on a monthly basis as long as, as well as with the status of the labor relations agreement, to the administrator of the Michigan Employment Relations Commission.

That is reviewed regularly at the meetings of the commission. We are therefore able to detect a pattern.

We provide specific training for both, our staff to give them the best benefit of knowledge in a specific area, for mediators when dealing with the parties. And more specifically this came into being in the late 70's with some of the school districts that it had occurred in Southeast Michigan. Of note was with the NEA, we had pattern-setting bargaining units that occurred with the Gibralter, Woodhaven, Romulus, and I have forgotten the name of the school district. But all of the districts went out on the strikes. Employers on the other hand were meeting, conferring separately. And that, we got within one -- it was between employers who wanted to settle it at 28 and one-half percent

increase in wages [546]over the three years, and the union wanted 29 percent, which from a professional standpoint when the mediators looked at it was half a percentage away or about eight cents an hour it amounted to, and we worked very hard on that issue.

But when the first contract settled, virtually the other three contracts settled within a number of days. So that you can see that the bargaining pattern does affect all the other, the benefits of the other employees.

In other words, if one district was able to make gains in a specific area by sharing that information with other school districts, they would, ah, the demands would be presented similar in others, and then if there was a pattern that was established, and if the employers indeed saw it was being in the other districts they felt more comfortable in giving increase in the fringe benefits or the related areas.

It works to the vice-versa also for employers, that if employers make some inroads in some management rights or prerogatives in one area they will attempt to do that in a specific zone or region.

Within Michigan we tended to look at, at least when I was in the Michigan Employment Relations Commission, we had a Detroit regional office, and there is specific training given to staff for the mediators assigned there. The Western Wayne County was treated as a separate area, and the [547]Traverse City area, the staff was assigned, and the U.P., Upper Peninsula of Michigan. They had, each area had specific issues that were unique to that specific geographical area. And the employers -- and you find it again, that labor disputes tended to be settled along the same lines, that the issues that were coming up in an area tended to be the same -- not in all instances, not in all instances, but I would say across the board in my experience, yes, it would.

* * * *

[553]Q. Mr. Hawthorne, besides your full-time employment with the SEIU, have you ever been paid for performance of services for a labor union on any occasion?
A. For a labor union I have served one time as a fact finder.

Q. Have you ever been present at any sessions for workshops [554]held by the Michigan Education Associations?
A. Yes. Well, when I was labor deputy director, and director of MERC, I was frequently called in to give overviews regarding the status of labor relations as well as all other programs that the Department of Labor would have administered. So as well as doing it for management groups and other, other labor organizations. This would be the state MEA usually at their annual convention, I did speak on occupational safety, collective bargaining and other issues.

Q. At their annual convention or at their --
A. At the convention.

Q. Or at the negotiation workshop?
A. The annual convention. I distinctly recall doing at the negotiating workshop that was held in Midland with the MEA and all of the zone directors, and also met on a regular basis with, with I would say, you know, Warren Culver and others from the MEA as well as management or other labor organizations as part of my regular duties.

* * * *

[556]Q. Does whether a contract is pattern setting from one bargaining unit to another depend upon whether the two units are the same geographical area?
A. It depends upon the issue. If the issue -- I guess that would depend upon the issue. I would say from my experience. Usually, the pattern setting would be by a specific geographic region, but I do take into account the overall state and national statistics for a specific classification if you are bargaining wages. So I would say yes, you would look at the geographical area, but there are also statewide implications.

Q. The effect of a settlement of a contract in Alaska in a National Education Association bargaining unit would set little precedent for a contract in Kalamazoo. Is that correct?

A. Let's take an issue like safety and health. If a bargaining unit establishes a contract with a specific right to know legislation in a safety and health clause, and that is brought to the table in Michigan, it could be precedent setting in Michigan. But as far as the wages, the wage rates in the state of Alaska versus the state of Michigan, I wouldn't say that would be comparable. But you would look at the wage rates for Michigan and the surrounding south and ea[illegible] of Michigan states, such as the wage rates in Ohio, and Indiana or Wisconsin, in preparing wage salary surveys. That [557]is done both by management and labor.

Q. Whether a contract is pattern setting from one bargaining unit to another also depends upon whether the two units are of similar types of employees. Is that correct?
A. That is correct.

Q. For example, a school janitors' unit would set little precedent for college faculty?

MR. SCHMEDLEN: I stipulate, Your Honor.

BY MR. LAJEUNESSE:
Q. Whether a contract is pattern setting from one bargaining unit to another depends upon whether the two units have the same type of employer. Is that correct?
A. That is correct.

* * * *

[558]Q. I am sure, Mr. Hawthorne, that we can think of specific items in any circumstance that might have an effect on something somewhere else, but in terms of general effect comparability depends upon geographic area and depends upon the type of employee. Is that correct?
A. I have seen in my experience over 10 years collective --

Q. My question isn't what you have seen over 10 years.
A. I am just saying --

Q. Or specifics on, or specifics. I am asking in general.
A. It has been argued that anything that could possibly impact on a collective bargaining dispute has been thrust in on comparability, but generally, yes, you look at the type of position and the area. But employers as well as other groups try and compare the types of like classifications.
[559] For example, Republic Airlines in the area is looking at right now in Southeast Michigan is looking at reservation agents and how that relates to clerical workers as to the effect of word processors. So it is both in the public and private sectors. So you do take, there is a whole universe of criteria that can be applied, and how that is being applied is constantly, constantly changing, as does labor relations, the flavor of labor relations agreements in Michigan.

Q. Based upon what you just said, Mr. Hawthorne, it is correct to say that comparability does not depend upon the identity of the bargaining agent?
A. No, I didn't say that. It doesn't actually -- there are other factors that may also be considered. But basically you look at the bargaining agent. For example, if the MEA is bargaining with specific groups and a specific area, they will compare the MEA groups as to what those members are getting as opposed to others. The same with the Michigan Federation of Teachers will compare their types of bargaining groups.

Obviously, there you can also add additional, you know, criteria into those programs. And in the AF of L-CIO segment, when you look at, at a UAW local versus a machinists local from the AF of L, there is a wide disparity between the types of bargaining units that come about [560]basically because of the skill and background of the negotiators for the specific units.

Q. A[nother] labor organization's contract could set a pattern that would assist MEA bargaining units.
A. That is true.

Q. I believe we have explored the, well, the effect of geographic units, and the type of employee on pattern bargaining. I am not sure I have asked, so I am going to ask it again if I have not

already asked it. Whether a contract is pattern setting from one bargaining unit to another depends upon whether the two units have the same type of employer?
A. Depends upon the same type of employer and who the bargaining agent also is, can impact it.

Q. The effect of a contract in one unit is less when the two units have a different kind of employer? For example, if one is a K through 12 school district and the other is a four-year university?
A. You are asking if there is a distinction in bargaining between higher education versus K-12. I would say that is correct.

Q. That is the answer to my question. Are there other economic variables other than geographic area, type of employee and type of employer which might affect whether one contract sets a pattern for another?

[561] MR. SCHMEDLEN: Your Honor, we will stipulate to that in part because he has already given at least six or eight of those other ones.

THE COURT: All right.

BY MR. LAJEUNESSE:
Q. Does the state of the economy affect whether or not a contract is pattern setting or not?
A. Yes.

Q. Does the number of employees in the unit affect whether it is pattern setting or not?
A. Yes.

Q. Even amongst similarly situated units, bargaining in one does not always set a pattern for another. Is that correct?
A. Using the term not always, I would say yes.

* * * *

[562]Q. Does pattern bargaining occur in the private sector as well as the public sector, yes or no?
A. Yes.

* * * *

TRIAL TRANSCRIPT,
TESTIMONY OF CATHERINE ANDERSON
[AND STIPULATIONS AND ADMISSION OF EXHIBIT]
Jan. 17, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

[Title omitted in printing]

* * * *

[2]Q. Who is your present employer?
A. Med-Ed Data Network Association.

Q. Is that connected with the Michigan Education Association?
A. Yes, it is. MEDNA, for short, provides administrative services to the MEA. That includes all accounting and finance functions, building, grounds, data processing, membership processing.

* * * *

[3]Q. Are you a certified public accountant?
A. Yes, I am.

* * * *

[4]Q. Are you familiar with the MEA accounting system as it existed in 1981, 1982?
A. Yes, I am.

Q. How did you become familiar with that system?
A. As I mentioned, I was transferred from MEFSA to the MEA accounting department in September of 1982. The fiscal year ends August 31. So it was my responsibility to make sure that, that the '81-82 fiscal year books were properly closed and the audit was completed.

• • • •

[19]Q. Now assuming that you have got a standard that everybody agrees upon, assuming that you have got a standard that not only everybody agrees upon but can apply accurately, what would be the burden on the accounting system of putting in place such a time sheet system that would identify and allocate time to each and every bargaining unit?
A. To each and every bargaining unit?

Q. Yes.
A. I couldn't even begin to really imagine it. We have 900 [20]bargaining units or so, approximately 900 bargaining units at the MEA. If, if what I heard you say was our employees are required to keep time according to which bargaining unit it applies to, I can't imagine it.

• • • •

[73]Q. Okay. Without attempting to comment on that, realizing your answer is somewhat speculative, if you were going to set up a system that requires you to identify chargeable versus non-chargeable at a specific bargaining unit, do you have any idea what would be involved in setting up that system?
A. I, I can't imagine a bargaining unit by bargaining unit.

Q. When you say you can't imagine it, is that because it would be so easy to do or so hard to do?
A. So hard to do.

• • • •

[73] MR. LAJEUNESSE: We have a stipulation that the counsel, that the parties have agreed to, to a stipulation of facts with regard to defendant Ferris Faculty Association. I will just proceed and read each of the stipulations, and Mr. Schmedlen will confirm that defendants agree.

• • • •

[74] MR. LAJEUNESSE: Two, the Ferris Faculty Association's expenditure of $149.99 for a Preserve Public Education conference, also stipulated in paragraph 20 of the uncontested material facts, at page 17 of the pretrial order, was for travel expenses to the MEA legislative/political action conference held on February 4 through 6, 1982, at Flint, Michigan.

MR. SCHMEDLEN: We so stipulate.

MR. LAJEUNESSE: Three, no strike or job action occurred at Ferris State College in 1981-82.

Some preparations for a possible strike were made in the fall of 1981 by the Ferris Faculty Association. The following expenditures of the Ferris Faculty Association stipulated in paragraph 20 of the uncontested material facts, at page 17 of the pretrial order, are variously characterized in the Ferris Faculty Association's records as, quote, strike, unquote, expenditures, quote, [75]job action, unquote, expenditures, and, quote, crises, unquote, expenditures, colon, crises center/strike headquarters, rent and other expenditures, $3,821.04;

Newspaper advertising, $256.20; signs, posters and buttons, $141.21.

In addition, $75 was spent by the Ferris Faculty Association for rent for a meeting hall for a membership meeting on Monday, October 12th, 1981, for the purpose of voting whether to accept the college's contract offer or support a strike.

MR. SCHMEDLEN: We so stipulate, Your Honor.

• • • •

* * * *

MR. LAJEUNESSE: For the purposes of ease in relating that stipulation to the pretrial order, stipulation, the $3,821.04 which was listed as, as whatever, strike headquarters, and rent and other expenditures, is a total of the amounts contained on page 17 and paragraph 20, listed individually under the general heading crises center/strike headquarters.

THE COURT: I got you.

MR. LAJEUNESSE: Your Honor, in relation to the issue of the chargeability of the strike preparations by the Ferris Faculty Association for which expenditures were made in 1981, plaintiffs move the admission of plaintiff's 33 as [76]to which no objection was, it was stipulated in the pretrial order that there would be no objection to the admission of plaintiff's 33.

* * * *

[77] THE COURT: I will receive Exhibit No. 33.

* * * *

TRIAL TRANSCRIPT, VOL. IV,
TESTIMONY OF ELIZABETH M. BAKER
Apr. 23-24, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

[Title omitted in printing]

* * * *

[567]Q. Where are you presently employed?

A. I am employed by the Michigan Education Association in East Lansing, Michigan.

* * * *

[568]Q. Can you also outline your employment history with the MEA, please?
A. I started working for the Michigan Education Association in 1970. I was employed as a UniServ director in the city of Flint, working for the UniServ, excuse me, the United Teachers of Flint which is a local UniServ unit of Michigan Education Association.
Should I continue?

Q. Please.
A. I was employed by the United Teachers of Flint from 1970 through about the fall of 1983 -- '73. And in 1973 I went to work for MEA at its headquarters in East Lansing, and as the State Agencies Consultant.
In 1975, after the death of one of the lobbyists, I was literally assigned to be an MEA lobbyist or legislative consultant. I served in that capacity until the summer of 1981 when I was promoted to management as the director of the Government Affairs department of MEA.

Q. Have you held the position of director of Government Affairs department since 1981?
A. Yes, I have.

[569]Q. During the 1981-82 fiscal year you were the director of Government Affairs?
A. Yes.

Q. Did you also serve as the lobbyist in that department during that year?
A. Yes. As a part of my employment as director I also carry the title as chief lobbyist for the Michigan Education Association.

Q. As director of the Department of Government Affairs in 1981-1982, what staff were you in charge of?

A. I was in charge of all of the then Public Affairs staff. Prior to that we had been a joint division of Public Affairs and Communications staff. My staff consisted of the three lobbyists including myself, three political action consultants. There was a higher education consultant, state agencies consultant, and a retirement consultant.

* * * *

[578]Q. Can you explain how higher education, particularly as an example, Ferris State College, is funded in the state of Michigan?
A. All of the money for higher education in terms of the way we work with it comes from the state legislature. The other half of their money -- I won't say half, but the other part of their money comes from tuition as you know.

* * * *

[588]Q. Are millage elections held which affect the funding of higher education institutions in Michigan?
A. They are held for community colleges but not for four-year institutions.

* * * *

[590]Q. Turning your attention to footnote four of Exhibit No. G, that footnote indicates that you calculated 40 percent of the political action consultant's time was spent on non-chargeable activities, and, therefore, 60 percent was spent on chargeable activities. Were those your initial calculations?
A. No. Initially I had calculated the 70 percent of their time was spent on chargeable expenses or activities.

Q. And that was reduced to 60 percent?
A. Yes.

* * * *

[607]Q. Your understanding of collective bargaining is that it is a process that occurs at the local level between an employer and the employees' bargaining representative for the purpose [608]of obtaining a contractual agreement between those two parties. Is that correct?
A. That is the definition I have used in the prior testimony, and that is the definition that I am using now, collective bargaining.

Q. In 1981-82, did any of the staff of Government Affairs department participate in that process of collective bargaining?
A. Directly or indirectly?

Q. Directly.
A. No, Government Affairs staff do not bargain contracts. They do bargain with the legislature, and in terms of when I say interacting, lobbying is a bargaining process. They do bargain and with the State Board of Education. That is lobbying, again which is a bargaining process, trying to get, to attain our goal.

Q. It is not collective bargaining?
A. But it is not collective bargaining.

* * * *

[609]Q. What is your understanding of contract administration, Ms. Baker?
A. At the local district level?

Q. Yes.
A. Yes. It is my understanding that that is the implementation of the contract that has already been collectively bargained.

* * * *

Q. What is your understanding of grievance adjustment?
A. It is my understanding that -- I did not hear your last [610]word.

Q. Adjustment?

A. Grievance adjustment is again, if an item has been bargained in the local agreement, then the grievance or adjustments are handled at the local district level between the UniServ staff and the grievant. It is a process by which there is an address of our alleged wrongdoing by the local board through its principals, whoever is, who is the supervisory person, and the grievant, the member.

* * * *

[628]Q. Your Honor, I am handing the witness what has been marked for identification as plaintiffs' Exhibit No. 197, plaintiffs' Exhibit No. 201, plaintiffs' Exhibit No. 204. If you would examine those, Mrs. Baker. Would you identify those documents, Mrs. Baker?
A. The first document seems to be an invitation to, well, I will just say what it is. It is from the Government Affairs department, and it is formulation of training, of screening and endorsing committees, and we attach the 1982 legislative political action conference enrollment form. They are being invited to attend.

MR. GREELEY: Your Honor, maybe we can speed things along. I will stipulate that 197 is a memorandum regarding the formulation regarding training and screening and endorsement committees; that 201 is a memo regarding legislative political action conference held during the 1981-82 fiscal year; and that 204 is the administrative guidelines for congressional contact teams, and 204 is a legislative contact team agenda for conference.

* * * *

[629]Q. Mrs. Baker, do all of these documents deal with the legislative political action conference, 1981-82?

MR. GREELEY: Stipulate.

BY MR. LAJEUNESSE:
Q. Was the expense of that conference included as a non-chargeable cost in your determination?
A. It is non-chargeable.

Q. Including the time of the legislative consultants at --
A. The whole activity.

Q. The seminars, sessions?
A. All of the involvement of the staff in this conference has been charged as non-chargeable.

Q. How could I verify that?
A. The -- I have to repeat myself about the job that I have. The performance goals of the individual include that there shall be a legislative PAC conference. They are expected to participate ir that. That has been determined through the consultation with the attorneys, with Pete McNenly and myself, that this is an activity that we cannot charge.

Q. So that you are saying that their time, the time of the consultants in preparing for and conducting this training, in conducting this training conference, would have been considered non-chargeable or was considered non-chargeable?
A. Everything that related to this conference was non-[630]chargeable.

Q. How about the expenses associated with the conference other than the time of consultants?
A. I don't understand.

Q. Is that considered non-chargeable?
A. What expenses? I don't understand.

Q. Printing materials, renting the hall?
A. You are talking about consultants' time in doing this?

Q. No, I am talking about the money that the Michigan Education Association expended to print programs and other materials used?
A. It is all included in the Government Affairs budget. It is all included as an activity in those things that we have identified as not chargeable.

* * * *

[632]Q. If you look at defendants' Exhibit No. A, page 24, if you will tell me which line item would reflect the expenses for the regional training seminars, the advanced political action training seminars, and the legislative political action conference that we have just discussed?
A. You mean where did the MEA put the money?

Q. Where would the money have been?
[633]A. On the political education.

Q. For all three?
A. What?

Q. For all of those three types of sessions, were charged under political education?
A. Yes. I would like to make an addendum. If we brought in contact teams, if you will note that item 23, that would have included their costs for coming to that kind of a conference.

Q. That would have been under item 23?
A. Yes.

Q. And no portion of that was considered non-chargeable. Is that correct?
A. That is not a chargeable expense.

MR. LAJEUNESSE: Your Honor, I move the admission of 197 and 201, 204 with regard to the exhibits, the exhibits with regard to the legislative, political action conference.

MR. GREELEY: Same objection.

THE COURT: The Court will receive 197, 201, 204.

* * * *

[642]Q. Did the political consultants provide assistance to locals, school board elections, in 1981-82?
A. Excuse me. If there had been any elections in 1981-82, the job performance of the political action consultants would have been to give that technical help that I described for millage election, and to make them aware of the process, any training that would have been needed. Usually, the involvement in a local political school board election is handled at [643]the local level. Our members make that decision. They sometimes call on the political action consultants for technical help, and that is how to put together a campaign.

Q. Would you have included that time?
A. Yes, I would have included that time.

Q. In the school board elections as non-chargeable?
A. [In the f]orty percent non-chargeable.

* * * *

[648]Q. How does this ballot proposal to prohibit automatic pass-through for utility fuel costs relate to collective bargaining of higher education?
A. Well, if --

MR. GREELEY: We will stipulate that we consider that a non-chargeable activity.

* * * *

[650]Q. If you will turn to pages beginning at page eight, this is of course the Government Affairs department, and at page nine at the bottom of the page and continuing on to page 10 where

there is discussion of three petition drives which were underway. If you can take a second just to look at those to refresh you memory?
A. I am familiar with the three proposals.

* * * *

Q. Can you describe to us your opinion as to, tell us your opinion as to how these proposals relate to collective bargaining in higher education?
A. All three of the proposals propose to in some way change the tax structure in Michigan such that the revenue would not be the same. The first proposal which is called "Trim," a proposal that would eliminate the property tax from school millages, that particular proposal would significantly affect our K-12 and community college funding.

[651]Q. But it would have no effect on --
A. Not that one.

Q. On higher education institutions?
A. Not that one, no. The next one, the Roy Smith proposal that would place an exemption on residential and agricultural property taxes from school operated costs, et cetera, exempts any educational unit from budget cuts, protects business and industry from additional taxes, and increases the sales tax to five percent, that would have a direct effect on four-year institutions.

As I mentioned yesterday, four-year institutions receive their funding from the state legislature, from grants and from tuition. The sales tax is a method of funding education in Michigan, a portion of the sales tax.

Q. Is the sales tax earmarked for education?

[Interjection of the Court omitted in printing]

THE WITNESS: Funding for higher education is funded [652]in several ways. The state legislature provides the appropriations. How the state legislature gets its money is from

different sources for all of education. In this case the proposal you reference is dealing with the sales tax revenue. A portion of the sales tax is earmarked for education, not all of it, all education at all three levels.

BY MR. LAJEUNESSE:
Q. Where is it earmarked for education?
A. The money goes into the general fund of the state of Michigan, and it is earmarked into that fund.

Q. You didn't answer my question. How is it earmarked? What makes it earmarked for education? Is there some law somewhere that says a certain percentage?
A. Yes, the laws that dictate the funding for all education states what portion of sales tax goes to education.

The third proposal is Tisch Three. It is a proposal proposing to roll back the property tax to a level of 1980, the year 1980, thereby reducing the SEV by 15 percent until 1987. It further establishes a county tax commission in 1987 to set the tax rates, provides a cut in the property taxes for any household with income between 8,000 and $12,000, and exempts from taxes households with incomes below $8,000, limits assessment increases, and requires 100 percent reimbursement to local units of government. In this particular proposal because it is dealing with the local property taxes [653]it does not directly affect the funding of higher education except if this proposal had passed, in my opinion, it would have affected the total appropriations process.

When you are looking at the budget for funding of K-12, community colleges and higher education, and you take out an amount of dollars that you have, that you appropriated over all, you run the risk then of having to cut across the board, and we refer to that then as an executive order cut, and higher education, four-year institutions, could have been cut under this proposal.

Q. So in your opinion it was an indirect relationship between the Tisch Three proposal and the higher education fund?

A. Indirect in that higher education does not receive its funding directly from property taxes.

Q. Do statewide ballot propositions increasing taxes necessarily result in increased salaries and benefits in collective bargaining contracts?
A. As I testified earlier, the money from revenues in the state go to the general fund, and then me, meaning the Government Affairs legislative staff, bargained with the legislature, worked with that process to get the correct amount of dollars appropriated to the appropriate levels of education.

Q. But the ballot proposition itself does not mandate that [654]teachers' salaries and benefits be increased. Is that correct?
A. That was not the purpose of the ballot proposals. The ballot proposals referenced here are dealing with how revenue shall be collected, how it shall be expended, and what cuts should take place, thereby having a significant effect on the state budget.

Q. Increased salaries and benefits for teachers depend upon first your success in lobbying the legislature. Is that correct?
A. I wouldn't state it that way. I would indicate that salaries and benefits for teachers as, are a direct result of a constitutional mandate to the state of Michigan that it funds public education. The process by which we use to get that revenue is to work with the state legislature, the agencies of government and the governor, and I call it bargaining with the legislature or negotiating with the legislature to get the money back into the local districts whereby the collective bargaining process, we agree to the definition, is the process for getting the money for the salaries.

Q. In short, first if there is an increase in taxes as a result of the state ballot proposition you have to, quote, unquote, "bargain" with the legislature to get the legislature to appropriate the funds for education, and then after that [655]you would also have to bargain with the local school board to convince the members of the school board to increase salaries when it comes to bargaining time. Is that correct?
A. That is correct.

* * * *

[657]Q. You did not consider the cost of millage campaigns to be chargeable? Is that correct?
A. I did not? I did not consider it?

Q. You considered -- I am sorry. I misstated. You considered them to be non-chargeable. Is that correct?
[658]A. Millage campaigns are chargeable.

Q. I am -- I had my tongue twisted, Your Honor. I apologize. Sometimes chargeable and non-chargeable get confused. Millage campaigns were not what you refer to as inhouse campaigns, were they, Mrs. Baker?
A. Millage campaigns are for our members, for the benefit of our members, but they include the large, the population of the district in which the millage is being conducted. Taxpayers vote on millages.

Q. And the campaigns run by the Michigan Education Association are directed at the general public. Is that correct?
A. No. The campaigns for millage elections are directed at our members to get involved in the process. The millage campaign or the millage election itself is the responsibility of the local school district. There are many occasions on which the local education association, the staff of the MEA and the local school districts work together because it is in their common interests to get a millage passed.

Q. And the local association worked with the school district and perhaps with other groups in the --
A. That is very common.

Q. In the district to convince the voters to vote to increase the millage. Is that correct?
A. That is a very common practice.

* * * *

[662]Q. Four-year institutions derive no part of their funds from millages. Is that correct, Mrs. Baker?
A. I have stated that, and, no, they do not.

Q. Even --
A. Four-year institutions. Community colleges do.

Q. Even in K through 12, community colleges, do increased millages necessarily result in increased salaries and benefits under a teacher contract?
A. I think you are asking me a question of judgment based [663]upon the skill of bargainers. It is the history of MEA that when millages have been passed and bargainers have done what they are supposed to do, which is bargain equitable contracts, it has indeed resulted in higher salaries for employees.

Q. Monies that are appropriated through the millage process are not earmarked for teacher salaries and benefits? They could be spent on other things. For example, to buy school buses or make improvements in the school, and buy books, so on. Is that correct?
A. The law that allows --

MR. GREELEY: We will stipulate to that.

* * * *

[680]Q. Next bill is provide summer school tax collections?
A. A chargeable expense.

Q. How does that relate to collective bargaining at Ferris State College?
A. Oh, for Ferris State College it would have no direct relationship because it is, it is again dealing with the property tax question, K-12 and community colleges.

Q. Next bill is make property tax circuit breaker more visible?
A. We are dealing again --

Q. Chargeable or non-chargeable?
A. Chargeable.

[681]Q. How does that relate to collective bargaining at Ferris State College?
A. The faculty and other members at Ferris State College are property tax payers. Under this particular law if the circuit breaker was adopted, and I am trying to see here -- it was vetoed by the governor -- the faculty as well as the residents of that district would have benefitted in terms of getting a tax break.

Q. It affected them as taxpayers. Is that correct?
A. Yes.

Q. Not as employees of Ferris State College?
A. No, because they don't use the property tax for purposes of revenue.

Q. Any bill that MEA lobbies on, that affects the member of the MEA as a taxpayer, is a chargeable expense?
A. No. This was a chargeable expense because it directly affected K-12 and community colleges. You asked me about Ferris State, and it was trying to explain.

[682]Q. What was "Truth in Taxation" legislation?
A. It is a piece of legislation that says that the government must notify the citizens of Michigan about their taxes.

Q. How does that relate to collective bargaining?
A. Directly relates to collective bargaining in that the [683]taxation process in Michigan is another way of getting revenue to put into the budget for funding education.

Q. So any legislation that results in taxation you consider to be chargeable?
A. I am not going to go that far. You would have to give me a definitive piece of legislation, and I will tell you if that relates

directly to collective bargaining, but if it is taxation that is for the purpose of public education, it does relate to collective bargaining.

Q. Education funds are derived from the general fund. Is that right?
A. So are a lot of other things, but the answer to your question is yes.

Q. So that any legislation on which the MEA lobbied which concerned taxation for the general fund would be considered chargeable?
A. For education. I have to make that distinction because from the general fund, appropriations for social services and mental health, public health, and other services that are rendered by government.

* * * *

[684]Q. Back just quickly to income tax and inrease in the 10-cent increase in the cigarette tax. I presume that you consider those chargeable and related to collective bargaining at Ferris State College because they provided funds for the general fund of the state of Michigan?
A. Right. And as we have discussed yesterday all of the [685]funding for, from the state, all of the funding from the state -- excuse me. Let me back up. Ferris State College derives its funding for education from the state as well as from tuition and grants.

* * * *

[686]Q. Does any of the legislation listed on page 19 in the list of state issues of interest in defendants' Exhibit No. S, necessarily result in increased teachers' salaries and benefits under the contract?
A. If you are asking me to make a statement of fact if indeed in that '81-82 year there were increases?

Q. No, not whether there were increases. I am saying do any of these pieces of legislation necessarily result in increased teachers' salaries and benefits under a contract?
A. Yes, if bargained for.

Q. Which contracts? If bargained for?
A. Yes.

Q. That is not necessarily a result, though, is it? You can get what you want in bargaining. Is that correct?
A. No, bargaining is a mutual, a process --

* * * *

[687]Q. The state legislature does not negotiate or ratify or administer the collective bargaining agreements of Ferris State College, right?

MR. GREELEY: Stipulate.

THE COURT: And obviously true.

BY MR. LAJEUNESSE:
Q. The Michigan state legislature does not adopt or implement the budget of Ferris State College. Is that correct, Mrs. Baker?
A. They do not. The board of trustees are, or whatever the governance body there, adopts that.

Q. Only the board of control of Ferris State College?
A. Yes.

Q. Controls the budget and expenditures of Ferris State College?
A. I think we are in agreement. That is what I was responding to, whatever the board is. In Ferris it is the board of control.

Q. The state legislature merely provides appropriations for [688]the general budget of Ferris State College?
A. That is one of their functions.

Q. Relating to Ferris State College?
A. And other higher education institutions.

* * * *

[694]Q. I am asking in your knowledge did the Michigan Education Association through the congressional contact team program lobby for increased federal funding in 1981-82?
[695]A. To my knowledge the National Education Association through its contact team program did indeed lobby for federal funds for education.

Q. And that would have included the contact team program in Michigan. Is that correct?
A. Yes.

Q. How does that relate to collective bargaining for Ferris State College?
A. I have stated before that, that all levels of education receive their funding from several sources of funding. One of those sources of funding is the federal source. Ferris State College does receive federal dollars, comes into the state as a pass-through. Some money goes to the colleges as a direct grant depending upon what kind of research or what kind of activity is going on at the university.

* * * *

[717] MR. LAJEUNESSE: I think we have a stipulation that will simplify matters at this point, Your Honor. Mr. Greeley says that he is willing to stipulate that the following [718]report appears in the minutes of the MEA board of directors dated January 15 and 16, 1982, under the heading "school funding," quote, "Liz Baker, director of Government Affairs along with two of her associates, Al Short and John Meeder, presented the recommendation of their division for the Preserve Public Education program as well as presenting an activities schedule in Timeline for implementation of the program. Following this presentation the board members met in small groups to discuss

this recommendation, and each group reported their findings." End quote.

And then the minutes reflect that a motion to adopt the Preserve Public Education program was carried. Do you stipulate?

MR. GREELEY: I will stipulate to that.

MR. LAJEUNESSE: Those minutes referred to an activity scheduled in Timeline for implementation of the Preserve Public Education program. I need plaintiffs' 164.

Your Honor, I am handing the witness what has been admitted as plaintiffs' 164. * * * *

* * * *

Q. Mrs. Baker, this was plaintiffs' Exhibit No. 164, was one [719]of the activities scheduled and Timeline used in the Preserve Public Education program in 1981-82. Is that correct?
A. That is correct.

* * * *

Q. And plaintiffs' 164 outlines the plan of action for Preserve Public Education, and details responsibilities for each department for that program. Is that correct?
A. That is correct.

* * * *

[724]Q. Preparation for and participation in the 1981-82 election campaigns was an integral part of the Public Education program. Is that correct?
A. I would not say yes to that unequivocally. The Preserve Public Education program was a funding program to cause the state legislature to move toward a 50 percent maximum funding for all of Public Education, K-12, community colleges and higher education. To the extent that it involved legislators and their action on the state aid budget, on the community college budget,

and on the four-year institution budget, and then it was an appropriate program for funding.

If it related at all to political action, it is that, it was taken into consideration when legislators were running for their campaign, and that would have been over [725]the, you know, over the years. They stood for election in 1982.

Q. Well, if you look, if it wasn't an integral part of the PPE program, Mrs. Baker, could you tell me why plaintiffs' 164 which is your Timeline, on pages three and four of the Timeline?
A. Which document are you using?

Q. Plaintiffs' 164. This is the Timeline. You have that.
A. In this document?

Q. Pages three and four. I haven't asked my question yet. Include as the, among the activities of the Preserve Public Education program a series of election campaign activities culminating in the general election day, and evaluation of election 1982.
A. It is a priority project of the MEA to finance public education. Our Preserve Public Education program was a project to implement the getting the funding for public education. It did integrate with the political process.

* * * *

JUDGMENT
[6th Cir. Aug. 14, 1989]

United States Court of Appeals

FOR THE SIXTH CIRCUIT

FILED
AUG 14 1989
Leonard Green,
Clerk

No. 87-1700

JAMES P. LEHNERT, ELMER S. JUNKER, JAMES LINDSEY, SAM C. PETICOLAS, JOHN R. SCHAUBLE and THEODORE D. SPEERMEN,
Plaintiffs-Appellants,
v.
THE FERRIS FACULTY ASSOCIATION; MICHIGAN EDUCATION ASSOCIATION; NATIONAL EDUCATION ASSOCIATION OF THE UNITED STATES,
Defendants-Appellees.

Before: MERRITT, MARTIN and MILBURN, Circuit Judges.

JUDGMENT

ON APPEAL from the United States District Court for the Western District of Michigan.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby affirmed.

IT IS FURTHER ORDERED that Defendants-Appellees recover from Plaintiffs-Appellants the costs on appeal,

as itemized below, and that execution therefor issue out of said district court, if necessary.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

/s/
Clerk

Issued as Mandate: November 17, 1989

[Attestation & taxation of costs omitted in printing]

(9)

No. 89-1217

Supreme Court, U.S.
FILED
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

JAMES P. LEHNERT, *et al.*,
Petitioners,

v.

THE FERRIS FACULTY
ASSOCIATION-MEA-NEA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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JOINT APPENDIX, VOLUME II, EXHIBITS

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ITEMS REPRODUCED IN APENDICES TO THE PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 26.1, the following items which have already been reproduced in the appendices to the petition for a writ of certiorari are not reproduced again in this Joint Appendix:

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Order Granting Leave to File Petition for Rehearing Out of Time (6th Cir. Sept. 19, 1989) 89a

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PLAINTIFFS' TRIAL EXHIBIT 21
MINUTES, FFA EXECUTIVE BOARD MEETING
FEBRUARY 3, 1982
[Offered & admitted Jan. 14, 1986]

FFA EXECUTIVE BOARD MEETING
February 3, 1982

* * * *

4. Bob Krueger reported as president of the 13-E Coordinating Council. This council, largely inactive in the past, is being reactivated and reorganized. As well as the faculty from Central and Ferris, other bargaining units from these schools will be added to the council. The purpose of this council is to approve and direct MEA personnel working for the council, set schedules and guidelines, arrange training for members, develop self evaluation and promote PAC activity. A motion of general support for the 13-E Coordinating Council and its present political activities was made (Krueger-Brown) and carried.

Bob also reported on the "MEA-NEA PAC Giveaway" which is a lottery intended to raise funds in support of candidates favorable to education. Each member will receive a card to be filled out and returned to MEA. The member will be invited to include a PAC contribution with his card. A drawing and awarding of prizes will occur in the spring.

* * * *

Respectfully submitted,
Ron Shepler
Acting Secretary

PLAINTIFFS' TRIAL EXHIBIT 29
MEA JOB ACTION INVESTIGATION REPORT
RE FERRIS FACULTY ASSOCIATION
AUGUST 12, 1981
[Offered & admitted Jan. 14, 1986]

[Michigan Education Association
logo omitted in printing]

JOB ACTION INVESTIGATION REPORT

Local Ferris Faculty Ass'n. **Zone** 3 **Region** 13-E
Number of Members 516 **Number of Students** 11,000+
MEA Board of Directors Members:
Phil Stich
Judy Stoops

Investigation Team: Diane Malmo, Jackie Zenser
A Job Action Investigation was conducted on August 12, 1981
Those members of the Association(s) present included Robert Krueger, Fred Wilson.

A. For each question respond with a check mark (√) for the appropriate answer. If additional comments are desirable, space is available at the end of the form.

* * * *

	Yes	No	See Comments
11. Do bargaining unit members clearly understand the issues and will they agree to withhold services in sufficient numbers to require the Board to negotiate further?	X	_	We expect the unit to strike on economics alone, if necessary

* * * *

	Yes	No	See Comments
13. Can all buildings be effectively closed?	X	_	_____

* * * *

16. Has a strike budget been prepared and adopted?	X	_	_____

* * * *

E. Additional comments and/or observations of the Investigation Team including identification of type (see Job Action, p.1 of Policy) and duration of job action anticipated. (Complete this section for all Job Actions)

(Attached)

* * * *

Respectfully submitted,

/s/ Diane Malmo — August 12, 1981
(Investigator) **(date)**

/s/ Jacalyn A. Zenser — August 12, 1981
(Investigator) **(date)**

Distribution: **MEA Executive Director**
MEA Executive Committee
MEA Region Board Members
Region President

Associate Executive Director for UniServ
Zone Manager
Local UniServ Staff
Local President
MABO Chairperson
MESPA President (for MESPA or coalition investigations only)
MESPA Director

E. The Ferris Faculty Association is doing a good job of getting prepared and organized for a possible job action. The leadership has done an excellent job of keeping the membership informed of bargaining progress throughout the summer.

It is very likely that an injunction will immediately sought and granted, however, the membership should be appraised of the possibility and problems of [illegible]ay strike.

If possible, the Association should establish a direct line of communication with any sympathetic Board of Control members and the two MESPA units on campus.

OUTLINE FOR JOB ACTION INVESTIGATION TEAM

* * * *

4. ANALYSIS OF THE FINANCIAL CONDITION OF THE DISTRICT

Enrollment has grown over the past three years, setting new records each fall. In particular students are continuing beyond associate degree options to BA/BS options, creating more pressure on upper level classes.

Though the economy of the state is poor, in spite of the recall of funds last year, the college has run in the black. Significant savings have been realized through administrative restructuring and lapsing of positions. No faculty have been laid off and the college has gone on record as saying that none will. Tuition, while steadily increasing for the last three years, still keeps the college highly competitive, in comparison to other Michigan schools, for attracting students. The state appropriation for 1981-1982 was increased by 13.8%. The college's financial health appears good.

* * * *

10. READINESS OF LOCAL ASSOCIATION FOR JOB ACTION

The leadership is ready. Since experiencing a job action three years ago, the "troops" are less apprehensive over instituting another but can only be deemed questionable.

PLAINTIFFS' TRIAL EXHIBIT 33
LETTER FROM BRUCE L. BEETLEY, PRESIDENT, FERRIS FACULTY ASSOCIATION, & MICHAEL D. McKEOWN, 13-E UNISERV DIRECTOR, TO KEITH GEIGER, PRESIDENT, MEA
OCTOBER 8, 1981
[Offered & admitted Jan. 17, 1986]

[FSC Faculty Association logo omitted in printing]

October 8, 1981

Keith Geiger
President
Michigan Education Association
P.O. Box 673
East Lansing, MI 48823

Dear Keith:

We want you to address our membership on Monday night, October 12. We expect between 350-450 members at the meeting. We realize that this request comes on absurdly short notice. Hence the mailgram. But it is senseless to apologize, because we are living in a crisis situation here and it is virtually impossible to know what is going to happen from one day to the next; let alone to make routine plans.

We have had a number of meetings -- at one of which a strike vote was taken which was three to one for strike. New developments took place thereafter, however, which obviated the need for us to walk when we had planned. But now another meeting has been called for Monday, October 12 at 8:30 p.m. at St. Peter's Church in Big Rapids. After we bargain again this weekend, our intention is to take back to the membership the last drop we have been able to squeeze our of the College. Then we will send the

mediator packing, set up one more bargaining date and call a strike next Tuesday.

Meanwhile, we are planning "activities" for this "Homecoming" weekend. The College's Board of Control will be here along with alumni, et al, and we have some "entertainment(s)" of our own in mind.

We hope you can come. It would certainly hearten our faculty to see you here as a show of support. We know how much you care, and we appreciate the help you have given us in the past.

On the other hand, we also know how busy you are; and how great an imposition such a request is in view, especially, of the shortness of the notice we are able to give you.

Still, the Executive Board thought we ought to try.

In any event, thanks.

Sincerely,

/s/

Bruce L. Beetley
President

/s/

Michael D. McKeown
13-E UniServ Director

pl

cc: Beverly Wolkow
Dave Thompson
Warren Culver

PLAINTIFFS' TRIAL EXHIBIT 55
LETTER FROM MARK JENKINS, 13-E UNISERV DIRECTOR, TO ART RICE, MEA
FEBRUARY 15, 1982
[Offered and admitted Jan. 14, 1986]

[MEA logo omitted in printing]

February 15, 1982

Art Rice
Michigan Education Association
P.O. Box 673
East Lansing, MI 48823

Dear Art:

You are probably aware of my recent higher education interim assignment to the 13-E Coordinating Council. During my brief involvement I've been able to sense that there is a problem within the 13-E Coordinating Council with regard to MEA identification. All of the bargaining groups involved within the Council have a distant feeling with regard to both the MEA and MEA services. This feeling within the MESPA groups is the result of the recent reorganization -- this situation will be resolved over a period of time through a simple continuation of essential services. The faculty situation, however, could seem to be more complex. Beyond the revolving door of interim UniServ Directors, and the change in the makeup of the Coordinating Council is the central question of "involvement within the parent organization."

All of the 13-E bargaining groups need a closer contact with the Michigan Education Association. This contact must be constant and to the benefit of both groups. The Ferris and Central groups would seem to be eager for such contact. The groups have developed strong leadership and effective leadership styles over the years with regard to bargaining and grievance handling.

But because of the distant feeling between the MEA and the groups in the Coordinating Council, there is a lack of contact and involvement on a state level.

Again, recognizing that my assignment is on an interim basis, a means of speaking to this needed contact and involvement would seem to necessarily come from your office location. I am of the opinion that not only would this type of contact generate involvement in the state organization, but would satisfy the groups' desire for access to staff with higher education experience.

Beyond these perceived needs is my personal concern with regard to higher education perspectives related to MABO's, CBC's and political action. I am concerned that per the January 22, 1982 MAHE minutes, higher education units have some perceptions of being in competition with each other versus trying to work together. Also, because of this competition perception, any political efforts, particularly with regard to the Preserve Public Education Program, will be greatly inhibited.

I would request that your office provide as much higher education service as is possible to speak to some of these needs. Also, the next 13-E Coordinating Council meeting will be held at the Cabin By The Shore on M-20 just west of Mecosta. If you were able to provide some consultant service at this meeting - including a review of the Preserve Public Education Program and the NEA-PAC program - it would be both well received and of great help in moving toward some 13-E MEA involvement.

Sincerely,

Mark Jenkins
13-E UniServ Director

MJ:pl
cc: Dick Ringstrom

PLAINTIFFS' TRIAL EXHIBIT 56
LETTER FROM MARK JENKINS, 13-E UNISERV DIRECTOR, TO DICK RINGSTROM, MEA
MARCH 29, 1982
[Offered & admitted Jan. 14, 1986]

[MEA logo omitted in printing]

March 29, 1982

Dick Ringstrom
Michigan Education Association
2186 - 44th Street SE
Kentwood, MI 49508

Dear Dick:

* * * *

On another level, the 13-E Coordinating Council is moving forward with the PPE program. The FFA past president (Bob Krueger) has tapped each individual member (by mail) regarding support of the PPE program. This message has also been sent to the president/executive committee at the CMU/FA. Because of the traditional view of the professorate and overt political activity, any activity that can be generated will be a plus (so maybe there will be a way to nuture what will be a small showing).

* * * *

Sincerely,

/s/
Mark Jenkins
13-E UniServ Director

MJ:pl

PLAINTIFFS' TRIAL EXHIBIT 73
REPORT CARD ON MEA'S 1982-84 GOALS & OBJECTIVES FROM FALL 1982 REPRESENTATIVE ASSEMBLY HANDBOOK
[Offered & admitted Jan. 13, 1986]

SECTION F

REPORT CARD ON THE GOALS AND OBJECTIVES OF THE MICHIGAN EDUCATION ASSOCIATION

Included in this section is a Report Card on the Goals and Objectives that were adopted by the Fall 1981 Representative Assembly for 1982-84. The Goals and Objectives begin on page 78 of your Constitution, Bylaws and Administrative Policies Manual that you received in August, 1982.

You will want to refer to that document during the Representative Assembly, so be sure to include it with the materials that you bring to the Assembly.

REPORT CARD

MEA-NEA GOALS AND OBJECTIVES

1982-84

(Adopted by the 1981
Fall Representative Assembly)

P R E A M B L E

MEA-NEA goals are established by Representative Assembly delegates to determine the Association's priorities in program and budget development. As a dynamic, progressive State Association, the MEA-NEA programs are interdependent, reciprocal, and complementary. No single goal can be achieved in isolation from related goals. To achieve MEA-NEA goals in all key areas

requires balanced, coordinated actions by all MEA-NEA components--elected leaders, staff and members.

MEA's highest priorities for 1982-84 shall be to advance the welfare of its members by continuing:

To provide bargaining representation and contract maintenance,

To protect the legal rights of its members and locals,

To effect changes in the political climate of the state to allow favorable fiscal reform for financing public education, and

To improve education and the profession.

This Report Card indicates MEA efforts or progress on the objectives under the various goals during the past year (1981-82).

A. PROFESSIONAL AND ECONOMIC RIGHTS

To promote the professional and economic interest of Michigan teachers and other school employees.

COLLECTIVE BARGAINING

To assure that all public employees enjoy the right to engage in good faith collective negotiations, fair treatment and due process as provided by law and to pursue legislation to remove restrictions on the right to strike and allow for third party resolutions of impasse, including binding arbitration, where the employee groups request such assistance. To secure legislation that requires local school districts to consolidate for the purpose of collective bargaining when the majority of teachers in their respective locals petition for such action.

1981-82 NOT ATTAINED

Local affiliates and multi-association bargaining organizations (MABOs), through their involvement in local bargaining, continuously assure that public school employees exercise their bargaining rights. However, a right-to-strike law has not been achieved since Gov. Milliken vetoed such a bill in July, 1980, and demanded restrictions that were unacceptable to MEA. There has been no legislation requiring school districts to consolidate for bargaining purposes. Local affiliates have consolidated, however, into MABOs to obtain some of the benefits of consolidated bargaining.

UNIFIED BARGAINING

To implement state, area, and local bargaining, to expand unified bargaining programs; to develop appropriate pilot programs with objectives, strategies, structures, and evaluation. The state, area, and local will work cooperatively toward achieving the bargaining goals and objectives as established by the Fall Representative Assembly.

1981-82 - PROGRESS

Unified bargaining has spread to cover more public school employees as MEA-affiliated bargaining units have joined multi-association bargaining organizations (MABOs). In turn, MABOs, with growing experience in unified bargaining, have refined their techniques and strategies. Notable this year has been the first vote by a big urban unit, Kalamazoo, to join the county MABO. Most of the local units of the county MABO are much smaller.

AGENCY SHOP

To negotiate agency shop clauses in all contracts.

1981-82 - PROGRESS

Of 555 K-12 and intermediate districts in which MEA affiliates are the bargaining agent, 470 or 84.7 per cent have agency shop. This compares with 80.5 per cent during the previous reporting period. Sixteen (64 per cent) of 25 higher education contracts that have been reviewed have agency shop. In 144 school districts with MESPA bargaining units, 115 or 79.9 per cent have agency shop. Recent progress in agency shop has been attained against determined Radical Right efforts to root out agency shop where it exists and to deny it to public employees who are still trying to achieve agency shop. Agency shop is an MEA minimum bargaining goal that has yet to be achieved for all public school employees.

B. GOVERNMENT AFFAIRS

To provide for optimal funding of public education and increased effectiveness to teachers' influence on Michigan education through political action.

TEACHER LICENSURE

To obtain legislation which provides legal status for the profession and establishes professional jurisdiction over licensing and the right to practice; eliminates the use of emergency permits and other substandard certificates; improves the universities' standards for entry of candidates into preparation for the teaching profession; and clarifies the role and qualifications of paraprofessional aides.

1981-82 - NOT ATTAINED

MEA has had input into a new approach to teacher certification under development by the State Department of Education. The approach embodies a concept advanced by MEA--to treat teacher preparation, certification, and later in-service as part of a unified career continuum. All interested parties,

including classroom teachers, would have recognized roles in planning and implementing all segments of the continuum. In recent years MEA had proposed licensure legislation but it had proved impossible to gain sufficient consensus even to report such legislation out of committee.

RETIREMENT

To seek funding of the Michigan retirement system to allow for an improved benefit formula. To maintain a coalition of the major school employee groups and retired school employees that can work to improve the retirement system, as outlined in the MEA Legislative Objectives. To provide a system of pre-retirement education to enable current MEA members to plan for retirement. To involve current retirees in MEA's political action program.

1981-82 - PROGRESS

The MEA's Office of Retirement Concerns works with a coalition that includes the Michigan Association of Retired School Personnel (MARSP), the Michigan Association of School Administrators (MASA), the Michigan Association of Secondary School Principals (MARSP), and the Michigan Elementary and Middle School Principals Association (MEMSPA). This past year the coalition lobbied successfully for a bill permitting retirement credit for released time of EA and other employee and professional organization officers. A suit filed against the state prompted it to resume timely transmittal of funds to the retirement system and to make the retirement fund whole for the payments that had been delayed. MEA has had the cooperation of the University of Michigan and NEA in the training of persons to run pre-retirement workshops. These workshops continue to be scheduled in most parts of the state. Local public school employee political action committees (PACs) are starting to involve retirees. MEA objectives of seeking statewide support from retirees have been blocked by federal election

regulations which bar such solicitation from those who do not enjoy full, active membership status.

TAX REFORM

To provide an adequate tax base as a source of revenue for public education which shall include major statewide tax reform, uniform property assessment and collection practices, full equalization of revenue per child per mill, reorganization and consolidation of school districts, and such other specifications as are adopted by the Representative Assembly and/or Board of Directors.

1981-82 - NOT ATTAINED

Circumstances have forced recent MEA efforts to be directed toward minimizing cuts in state funds for schools to survive. MEA won a temporary increase in the state income tax in 1982 which averted a $226 million cut in state school funds. MEA has not advanced a tax reform plan since statewide voter defeat of one supported by MEA in 1980. Instead, MEA has strongly advocated that the trend of declining state support for education must be reversed and restored to about 50 per cent. This is its "Preserve Public Education-Equal Partners" campaign that is long-term and is directed toward state leaders, primarily legislators.

FUNDING OF PUBLIC EDUCATION

To seek enactment of a State Aid Act that meets specifications as adopted by the Representative Assembly and/or Board of Directors. To provide leadership, representation and coordination of appropriations for all three levels of education: K through 12, community college and higher education.

1981-82 - PROGRESS

Through its lobbyists and a higher education coordinator, MEA provides leadership and advocacy in seeking funding for all levels of public education in Michigan. Noteworthy this past year was a meeting initiated by MEA of the faculty and administrative leaders of two of Michigan's universities to seek funding improvements. This was a "first"--bringing higher education institutions together to work on mutual concerns. Michigan's economic slump has forced MEA's efforts to be directed toward minimizing the cuts in school funds under the current state aid formula.

FEDERAL SUPPORT

To supplement NEA's efforts to secure funding for public education from public tax sources to equal at least one-third federal support for the public schools.

1981-82 - NOT ATTAINED

Attainment of this objective must await MEA-NEA success in electing more friends of education to Congress who will reorder national priorities. It will also await the election of a national administration in 1984 that recognizes the importance of education to the national security and well-being and that accepts the federal responsibility for assuring that education throughout the country meets the needs of the nation.

SUPPORT FRIENDS OF EDUCATION/COALITIONS

To seek out, support, elect and monitor individuals who support MEA-NEA goals and objectives. To form political coalitions with other organizations, including organized labor, who support MEA-NEA goals and objectives.

1981-82 - PROGRESS

NEA-PAC, MEA-PAC, and local school employee PACs have a system for endorsing candidates who are supportive of MEA-NEA goals and then campaigning to elect those candidates. The system also includes monitoring the candidates after their election to determine if their actions merit continued support and endorsement in future elections. In the August primary this year 78 per cent of school employee-endorsed candidates in contested races for the state Senate won. In the House of Representatives races, the per cent winning was slightly higher--80 per cent. The endorsed gubernatorial candidate won in the primary against several contenders. The final result was to be decided in the Nov. 2 election. During the current school funding crisis, MEA has had some success in building a school community coalition at the state level. A major thrust of the "Preserve Public Education" campaign has been to build local community coalitions of diverse groups to advocate improved state funding for schools.

LOCAL POLITICAL ACTION

To provide local associations with consultation in developing comprehensive political action.

1981-82 - ACCOMPLISHED

MEA has political action consultants who assist local EA and MESPA units throughout the year. They have helped more than 150 local affiliates this past year. Efforts have centered on millage campaigns and important successes have been achieved. Examples are Alpena, Pontiac, and Harper Creek, where millage victories averted or ended the closing of schools. In addition, consultants provide numerous screening and endorsing workshops as part of an effort to elect more friends of education to office.

STATEWIDE BALLOT ISSUES

To monitor the political development of statewide ballot issues and to take appropriate actions of support or opposition when necessary to meet MEA-NEA goals and objectives.

1981-82 - ACCOMPLISHED

MEA initiates, supports, and opposes statewide ballot issues as the need arises. No ballot issues of central importance to schools or school employees were identified as being on the 1982 ballot.

C. IMPROVING EDUCATION AND THE PROFESSION

To achieve for Michigan teachers a leadership position in improving classroom instruction and in advancing civil and human rights.

STRENGTHEN LOCAL AFFILIATES

To continue to strengthen the network of effective local affiliates, leaders, and members by providing comprehensive, general, administrative, consultative training and representative services; regular and comprehensive communications of the MEA-NEA; and training in organizational and leadership skills, especially for Third World and women educators.

1981-82 - ACCOMPLISHED

This objective is served in a variety of ways--through conferences and workshops, publications, and MEA consultant help to local affiliates. Publications include Teacher's Voice, a tabloid newspaper circulated 20 times yearly to all MEA and MESPA members and the following instructional and leadership development newsletters: the Motivator (dealing with sexism), the Manifesto (dealing with racism), the Advocate (dealing witn instructional issues), the Migrant

Motivator (dealing with migrant education concerns), and the Job Search (assisting teachers to find employment). The Legislative Bulletin keeps leaders up-to-date on federal and state government concerns. MEA professional development consultant has responded to a number of local-affiliate requests for help this past year in areas ranging from assertiveness training to mainstreaming. Conferences have included the statewide Instruction and Professional Development (IPD) conference, Women's Leadership, Third World Leadership, and Summer Leadership and regional IPD and minority involvement conference.

MEMBERSHIP ENROLLMENT

To enroll all pre K through 12, ISD, community/junior college and university employees, other certified teachers and MEA retirees.

1981-82 - PROGRESS

Gains have been achieved this past year in enrolling a higher percentage of higher education and school support personnel. Northwestern Michigan College at Traverse City was added as a new higher education bargaining unit. There are now 32 MEA-NEA affiliated bargaining units in Michigan two-year and four-year higher education institutions. The Michigan Educational Support Personnel Association (MESPA) has grown from 233 bargaining units a year ago to 250 bargaining units this year (1982). However, the number of employees represented has dropped from 10,817 a year ago to 10,783 this year, reflecting layoffs of school support personnel.

CERTIFIED TEACHERS

To continue to assure that every classroom is staffed with a certified teacher; to encourage affiliates to negotiate provisions which prevent boards of education from replacing teachers or teaching positions with paraprofessionals; and/or

teachers or other uncertified personnel to mandate that paraprofessionals must adhere to the role of paraprofessionals.

1981-82 - PROGRESS

MEA has developed suggested language for bargaining into local contracts that requires negotiations over any proposed changes in status of any position in the bargaining unit and that specifies job descriptions for paraprofessionals that are developed by the bargaining unit members to whom the paraprofessionals are assigned.

CURRICULUM IMPROVEMENT

To provide professional consultation and clearinghouse services regarding improvement of school curriculum, teacher participation in educational decision-making at all levels of instruction, teacher preparation activities in the improvement of school curriculum, and teacher participation in decision-making.

1981-82 - ACCOMPLISHED

MEA provides workshops and consultation and clearinghouse services to assist local affiliates in improving school curricula. The MEA suggests contract language to be bargained locally that is designed to assure teacher participation in instructional development and decision-making.

PROFESSIONAL DEVELOPMENT

To achieve an effective teacher influence in the pre-service and in-service education of teachers at all levels by aggressively pursuing and maintaining teacher control over the design and implementation of Teacher Centers and negotiating other in-service opportunities, including university courses designed for a specific group; by influencing the universities' teacher-training programs and establishment of

separate administrator training programs, and by gaining a seat on all governing boards of teacher-training institutions.

1981-82 - PROGRESS

In earlier years MEA and NEA have been successful in getting regulations specifying that classroom teachers be in the majority on local policy boards that administer the in-service funds from federal and state sources. This past year MEA input has done much to shape a new proposal that would treat preparation for teaching, certification, and career in-service as part of a unified continuum. Classroom teachers and all other interested parties would have input into all aspects of teacher career programs--from preparation to in-service. The concept is being developed by the State Department of Education.

ACCREDITATION

To obtain teacher majorities on the governance bodies of all accrediting agencies for all levels of public education.

1981-82 - NOT ATTAINED

The North Central Association of Colleges and Secondary Schools has continued to be totally unresponsive to concerns brought to its attention by MEA. Classroom teachers perform much of the agency's evaluation work, yet are not represented at all on its boards.

NONDISCRIMINATION

To continue to identify and resolve racism and sexism in the schools by working with state and local boards of education, and boards of trustees and regents, in the development of non-discriminatory hiring practices. To cooperate in a national concerted effort to influence publishing companies prior to the printing of textbooks and other instructional materials by providing consultation and clearinghouse

services to assist teachers: a) in identifying and resolving institutional racism in the schools; b) regarding useful research and curricula designs for minority group children, including adequate distribution of multi-ethnic texts and materials to all children; and c) regarding racism and sexism in education, including textual materials, curriculum, athletics, career education, compensatory education, special education, bilingual education, migrant education, and teacher behavior.

1981-82 - PROGRESS

MEA provides guidance for local negotiators seeking to bargain contract language to bar discriminatory employment practices. MEA also regularly provides consultant and workshop assistance to local affiliates and leaders in identifying and combating sexism and racism. Work on a multicultural handbook for use by teachers and leaders was nearing completion this year.

ACADEMIC FREEDOM

To guarantee academic freedom for all teachers and to vigorously oppose any attempts at censorship of published books and/or other materials in educational institutions.

1981-82 - PROGRESS

This is a new objective, reflecting MEA members' concerns about attempts around the nation to censor books and other materials used in schools. This objective is never permanently attained; like democracy, it must be continually safeguarded against attacks. It is protected by local EA leaders and affiliates that support boards of education in adopting and maintaining orderly and reasonable policies and procedures for the selection and use of materials in school to protect academic freedom for both teachers and pupils. MEA supported the court battle of a Memphis teacher to protect his academic rights against a concerted attack against his

teaching methods and materials. MEA helped to win a court order restoring him to a teaching position in his school district. A federal court jury this year awarded him $321,000 in punitive and compensatory damages. The court found that his school district and its board had, among other things, violated his academic freedom.

PLAINTIFFS' TRIAL EXHIBIT 158
APPENDIX D (1982 MEA-MESPA-NEA PRIORITIES)
TO THE MINUTES OF THE PRE-NEA
REPRESENTATIVE ASSEMBLY
COORDINATING COMMITTEE
MARCH 27, 1982
[Offered & admitted Jan. 14, 1986]

Appendix D

MEA-MESPA-NEA PRIORITIES
1982

MEA-MESPA-NEA Continuing Priorities

The goals of the MEA-MESPA delegation to the NEA Representative Assembly are to:

1. Make the passage of a national collective bargaining bill for public employees the number one top priority of the NEA Representative Assembly by:

   -- increasing parts of the budget that have to do with the passage of a collective bargaining bill;

   -- passing new business items which emphasize the importance of the passage of a collective bargaining bill;

   -- instructing state liaisons to push the passage of a collective bargaining bill with their contacts;

   -- impacting on budget hearings and Resolutions Committee hearings with the importance of the passage of a collective bargaining bill;

   -- continuing a Collective Bargaining Caucus whose purpose would be to promote the passage of a collective bargaining bill as the top NEA goal;

   -- enacting other activities deemed necessary by the MEA-MESPA delegation to the NEA Representative Assembly in order to secure the passage of a collective bargaining bill; and

   -- forming a national bargaining committee.

2. Elect Michigan and Michigan-supported* candidates to NEA Leadership positions.

3. Pursue legislative enactment of:

   -- General aid bill -- 1/3 Federal funding

   -- Ratification of Equal Rights Amendment

   -- Accelerated school and residential integration

   -- Mobile Teacher Retirement

   -- Preserve Public Education -- Equal Partners

4. To provide funds in the budget for pilot projects in multi-ethnic and feminist curricula.

5. To provide input into and review of the NEA budget.

6. To continue to support the activities of NEA-PAC.

7. To promote a comprehensive view of education -- local, state, national and international.

8. To eliminate Administrators from the active membership roles.

*Refer to "Caucus Rules and Regulations" -- # 8

PLAINTIFFS' TRIAL EXHIBIT 164
PPE ACTIVITIES SCHEDULE & TIMELINES
[Offered & admitted Jan. 13, 1986]

[MEA Job Request form omitted in printing]

WORKING DRAFT #5

Activities Schedule & Timelines
for
Preserve Public Education Program (PPE)[1]

ACTIVITY	RESPONSIBILITY	TIMELINE
Adopt PPE Program		
MEA Executive Committee	Exec. Director	Jan. 8
MESPA Board	Exec. Director	Jan. 9

[1]["GOALS" column omitted from the overall schedule in printing. The entries in that column were roman numbers and letters which are not explained in the record.]

ACTIVITY	RESPONSIBILITY	TIMELINE
MEA Board	Exec. Director	Jan. 13
MEA Professional Staff/ Mtg.	Exec. Director	Jan. 30
MAHE Board	Exec. Director	Jan. 30
Educate Membership (MEA & MESPA)		
MESPA Leadership Conference	Org. & Neg./Gov. Aff./Mem. Ser.	Jan. 22-23
MEA Professional Negotiations Workshop	Org. & Neg./Gov. Aff./Mem. Ser.	Jan. 29-30
MEA Leg./PAC Conference	Government Affairs/Mem. Ser.	Feb. 4-6
Teacher's Voice Indepth Feature(s)	Membership Services/Gov. Aff.	Feb. & Continuing

ACTIVITY	RESPONSIBILITY	TIMELINE
Informational materials to local EAs	Membership Services	Feb. & Continuing
Board of Directors Region Meetings		
with local leaders	Exec. Off./BD/Gov. Aff./ Uniserv	Feb. & Continuing
local leaders mtgs. w/ members	Local leaders/Uniserv	Feb. & Continuing
MEA Commissions/Task Forces	PDHR/Gov. Aff./Mem. Ser.	Feb. 12-13
Council of State Organizations	Gov. Aff./Mem. Ser.	Feb. 6
Native American's Conference	PDHR/Gov. Aff./Mem. Ser.	Mar. 11-13
Third World Leadership Conference	PDHR/Gov. Aff./Mem. Ser.	Apr. 20-25

ACTIVITY	RESPONSIBILITY	TIMELINE
R. A.	Exec. Off./Gov. Aff./Mem. Ser.	Apr. 29-30
Women's Leadership Conf.	PDHR/Gov. Aff./Mem. Ser.	Apr. 23-25
MEA-PAC Governing Board & Council	Exec. Off./Gov. Aff.	Mar. - Apr.
P.R. Conference	Membership Services/Gov. Aff.	May 21-22
Review PPE Activity		
Refine State and Local Organizing Efforts	All Staff & Governance	Mar. - Apr.
Summer Leadership Conference	PDHR/Gov. Aff./Mem. Ser.	Aug. 2-6
Statewide Screening & Endorsing Meeting	Exec. Off./Gov. Aff.	Jan. 22

ACTIVITY	RESPONSIBILITY	TIMELINE
Seek Support from Education Groups/Organizations		Jan. - Feb.
CAUSE	PDHR	
ELAC,MAEMSP,MASSP, Education Forum, AAUP, AAUW, PTA, AFSCME, League of Women Voters, State Department of Education, Middle Cities	Government Affairs	
MASA, MASB, MFT	Exec. Off./Gov. Aff.	
Council of College Pres.	Executive Office	
Michigan Community College Association	Executive Office/HE	
State Dept. of Education	Government Affairs	

ACTIVITY	RESPONSIBILITY	TIMELINE
Fund Raising Activities		
1. Initiate MEA/MESPA fundraiser for NEA-PAC Statewide Giveaway	Exec. Off./Gov. Aff./Mem. Ser./Uniserv	Jan. 28-29
2. Additional fund raising activities for MEA-PAC		
Captive Audience Collections	All Divisions	
Direct Mail Contribution Campaign	Exec. Off./Gov. Aff./Mem. Ser.	
Local/State Receptions	All Divisions	
Train Professional Staff		
- Specialized MEA/NEA Training in Political Action	Government Affairs	Jan. 12-14

ACTIVITY	RESPONSIBILITY	TIMELINE
- Professional Negotiations Workshop	Org. & Neg./Gov. Aff.	Jan. 29-30
- Professional Staff & Mgt. Meetings	Exec Off./Gov. Aff.	Jan. 28-29
(training in volunteer recruitment & fund raising)		
- Public Relations Staff Training	Membership Services	Continuing
- Local PR Workshops	Membership Services	
- MEA Leg./Pol. Action Conf.	Government Affairs	Feb. 4-6
- Public Relations Conference	Membership Services	May 21-22

ACTIVITY	RESPONSIBILITY	TIMELINE
Recruitment of Volunteers for Action		
Coordination of all volunteer activities	Uniserv/Mem. Ser./ Gov. Aff.	Feb. & Continuing
- Local Media Contacts	Volunteers/Gov. Aff.	
- Organizing Local PR Programs	Volunteers/Gov. Aff.	
- Speech outlines & background materials to Locals	Volunteers/Gov. Aff.	
- Fund raising Activities	Volunteers/Gov. Aff.	
Voluntary Contributions		
Collecting General Donations		

ACTIVITY	RESPONSIBILITY	TIMELINE
- Building local coalitions	Volunteers/Gov. Aff.	
- Election Campaigns	Volunteers/Gov. Aff.	
- Targeted Legislative Lobbying	Volunteers/Gov. Aff.	
Political Action for PPE		
Present Funding Proposal to Legislature & Membership	Government Affairs	Feb.
I. Internal Communication with Membership		
II. External Communication with Legislature		
Targeted Lobbying of Legislature	Exec. Off./BD/Gov. Aff./Uniserv/Mem. Ser.	Feb. - June

ACTIVITY	RESPONSIBILITY	TIMELINE
1. Contact Teams		
2. Local EA Presidents or Coordinating Council Chairpersons		
3. Member Leaders		
4. Joint Activity with other state organizations		
Adoption of PPE by State Party Conventions	Exec. Off./Gov. Aff./Volunteers	Aug.
Election Campaign Activities		
Organize Local S & E Committees	Gov. Aff./Uniserv	Feb.
Conduct S & E Interviews	Local leaders/Uniserv	Feb. - June
Distribute Local Endorsements	Government Affairs	June 30

ACTIVITY	RESPONSIBILITY	TIMELINE
Local Campaign Activities	Exec. Off./BD/Gov. Aff./ Membership Services/PDHR	Feb. - Nov.
1. Primary Election (Aug. 2)		
2. Complete Endorsements for General Election		
3. Precinct Canvassing		
4. Establish Telephone Banks		
5. Get Out Vote Organizations		
State Campaign Activities	Exec. Off./BD/Gov. Aff./ Membership Services	Feb. - Nov.
1. Primary Election (Aug. 2)		

ACTIVITY	RESPONSIBILITY	TIMELINE
2. Complete Endorsements for General Election		
3. Advertising Activities		
4. Get Out Vote Organizations		
General Election Day	All Staff and Governance	Nov. 2
Evaluate Election '82	All Staff and Governance	After Nov. 2

[notation regarding goal omitted in printing]

PROGRAM SERVICES DIVISION

Government Affairs

Responsibility for PPE

Activity	Timeline
Educate Membership (MEA & MESPA)	
MESPA Leadership Conference	Jan. 22-23
MEA Professional Negotiations Workshop	Jan. 29-30
MEA Leg./PAC Conference	Feb. 4-6
Teacher's Voice Indepth Feature(s)	Feb. & Continuing
Board of Directors Region Meetings with local leaders	Feb. & Continuing
MEA Commissions/Task Forces	Feb. 12-13
Council of State Organizations	Feb. 6
Native American's Conference	Mar. 11-13
Third World Leadership Conference	Apr. 20-25
R. A.	Apr. 29-30

Activity	Timeline
Women's Leadership Conference	Apr. 23-25
MEA-PAC Governing Board & Council	Mar. - Apr.
P. R. Conference	May 21-22
Review PPE Activity	
Refine State and Local Organizing Efforts	Mar. - Apr.
Summer Leadership Conference	Aug. 2-6
Statewide Screening & Endorsing Meeting	Jan. 22
Seek Support from Education Groups/Organizations	
ELAC, MAEMSP, MASSP, Education Forum, AAUP, AAUW, PTA, AFSCME, League of Women Voters, State Department of Education, Middle Cities	Jan. - Feb.
MASA, MASB, MFT	
State Department of Education	
Fund Raising Activities	
1. Initiate MEA/MESPA Fundraiser for NEA-PAC Statewide Giveaway	Jan. 28 - 29

Activity	Timeline
2. Additional Fund Raising Activities for MEA-PAC	
- Captive Audience Collections - Direct Mail Contribution Campaign - Local/State Receptions	
Train Professional Staff	
- Specialized MEA/NEA Training in Political Action	Jan. 12-14
- Professional Negotiations Workshop	Jan. 29-30
- Professional Staff & Mgt. Meetings (training in volunteer recruitment & fund raising)	Jan. 28-29
- MEA Leg./Political Action Conference	Feb. 4-6
Recruitment of Volunteers for Action	
Coordination of all Volunteer Activities	Feb. & Continuing
- Local Media Contacts	
- Organizing Local PR Programs	
- Speech Outlines & Background Materials to Locals	

Activity	Timeline
- Fund Raising Activities	
- Voluntary Contributions	
- Collecting General Donations	
- Building Local Coalitions	
- Election Campaigns	
- Targeted Legislative Lobbying	
Political Action for PPE	
Present Funding Proposal to Legislature & Membership	Feb.
I. Internal Communication with Membership	
II. External Communication with Legislature	
Targeted Lobbying of Legislature	Feb. - June
1. Contact Teams	
2. Local EA Presidents or Coordinating Council Chairpersons	
3. Member Leaders	

Activity	Timeline
4. Joint Activity with Other State Organizations	
Adoption of PPE by State Party Conventions	Aug.
Election Campaign Activities	
Organize Local S & E Committees	Feb.
Distribute Local Endorsements	June 30
Local Campaign Activities	Feb. - Nov.
1. Primary Election (Aug. 2)	
2. Complete Endorsements for General Election	
3. Precinct Canvassing	
4. Establish Telephone Banks	
5. Get Out Vote Organizations	
State Campaign Activities	Feb. - Nov.
1. Primary Election (Aug. 2)	
2. Complete Endorsements for General Election	
3. Advertising Activities	

Activity	Timeline
4. Get Out Vote Organizations	
General Election Day	Nov. 2
Evaluate Election '82	After Nov. 2

PROGRAM SERVICES DIVISION

Membership Services

Responsibility for PPE

Activity	Timeline
Educate Membership (MEA & MESPA)	
MESPA Leadership Conference	Jan. 22-23
MEA Professional Negotiations Workshop	Jan. 29-30
MEA Leg./PAC Conference	Feb. 4-6
Teacher's Voice Indepth Feature(s)	Feb. & Continuing
Informational materials to local EAs	Feb. & Continuing
MEA Commissions/Task Forces	Feb. 12-13
Council of State Organizations	Feb. 6
Native American's Conference	Mar. 11-13
Third World Leadership Conference	Apr. 20-25
R. A.	Apr. 29-30
Women's Leadership Conference	Apr. 23-25
P. R. Conference	May 21-22
Review PPE Activity	
Refine State and Local Organizing Efforts	Mar. - Apr.
Summer Leadership Conference	Aug. 2-6
Fund Raising Activities	
1. Initiate MEA/MESPA Fundraiser for NEA/PAC Statewide Giveaway	Jan. 28-29
2. Additional Fund Raising Activities for MEA-PAC	
- Captive Audience Collections	

Activity	Timeline
- Direct Mail Contribution Campaign - Local/State Receptions	
Train Professional Staff	
Public Relations Staff Training	Continuing
Local PR Workshops	
Public Relations Conference	May 21-22
Recruitment of Volunteers for Action	
Coordination of All Volunteer Activities	Feb. & Continuing
Political Action for PPE	
Targeted Lobbying of Legislature	Feb. - June
1. Contact Teams	
2. Local EA Presidents or Coordinating Council Chairperson	
3. Member Leaders	
4. Joint Activity with Other State Organizations	

Activity	Timeline
Election Campaign Activities	
Local Campaign Activities	Feb. - Nov.
1. Primary Election (Aug. 2)	
2. Complete Endorsements for General Election	
3. Precinct Canvassing	
4. Establish Telephone Banks	
5. Get Out Vote Organizations	
State Campaign Activities	Feb. - Nov.
1. Primary Election (Aug. 2)	
2. Complete Endorsements for General Election	
3. Advertising Activities	
4. Get Out Vote Organizations	
General Election Day	Nov. 2
Evaluate Election '82	After Nov. 2

PROGRAM SERVICES DIVISION

PD/HR

Responsibility for PPE

Activity	Timeline
Educate Membership (MEA & MESPA)	
MEA Commissions/Task Forces	Feb. 12-13
Native American's Conference	Mar. 11-13
Third World Leadership Conference	Apr. 20-25
Women's Leadership Conference	Apr. 23-25
Review PPE Activity	
Refine State and Local Organizing Efforts	Mar. - Apr.
Summer Leadership Conference	Aug. 2-6
Seek Support from Education Groups/Organizations	
CAUSE & Constituent Groups, Hispanic	Jan. - Feb.

Activity	Timeline
Comm. Groups, Center for School Improvement, MASCD, MAAE, MABE, CEC, SCADS	
Fund Raising Activities	
Additional Fund Raising Activities for MEA-PAC	Jan. 28-29
- Captive Audience Collections - Local/State Receptions	
Recruit & Train Volunteers	Feb. & Continuing
Election Campaign Activities	
Local Campaign Activities	Feb. - Nov.
1. Primary Election (Aug. 2)	
2. Complete Endorsements for General Election	
3. Precinct Canvassing	
4. Establish Telephone Banks	
5. Get Out Vote Organizations	
General Election Day	Nov. 2
Evaluate Election '82	After Nov. 2

PROGRAM SERVICES DIVISION

Organizing & Bargaining

Responsibility for PPE

Activity	Timeline
Educate Membership (MEA & MESPA)	
MESPA Leadership Conference	Jan. 22-23
MEA Professional Negotiations Workshop	Jan. 29-30
Review PPE Activity	
Refine State and Local Organizing Efforts	Mar. - Apr.
Fund Raising Activities	
Additional Fund Raising Activities for MEA-PAC	Jan. 28-29
- Captive Audience Collections - Local/State Receptions	
Train Professional Staff	
Professional Negotiations Workshop	Jan. 29-30

Activity	Timeline
Election Campaign Activities	
General Election Day	Nov. 2
Evaluate Election '82	After Nov. 2

Uniserv Responsibility for PPE

Activity	Timeline
Educate Membership (MEA & MESPA)	
Provide assistance to Board of Directors Region Mtgs. with local leaders and local leaders meetings with members	Feb. and continuing
Summer Leadership Conference	Aug. 2-6
- Review PPE Activity	
- Refine State and Local Organizing Effort	
Fund Raising Activities	Jan. and Continuing
- Initiate MEA/MESPA Fundraiser for NEA-PAC Statewide Giveaway	

Activity	Timeline
- Additional Fund Raising Activities Captive audience collections Direct Mail Contribution Campaign Local/State Receptions	Jan. & Continuing
Training Professional Staff	Jan. - Continuing
- Participants	
- Resource input	
Recruitment of Volunteers for Action	Feb. & Continuing
- Organize (refer to working draft #4 for specific activities)	
- Coordinate	
- Identify volunteers	
Political Action for PPE	
Targeted Lobbying of Legislature	Feb. - June
- organize and coordinate contact teams	
- organize and coordinate local EA Presidents	
- organize and coordinate member leaders	

Activity	Timeline
- support joint activity with other state organizations	
Election Campaign Activities	
Organize Local S&E Committees	Feb.
Coordinate S&E interviews	Feb. - June
General Election Day-Get Out the Vote	Nov.

PLAINTIFFS' TRIAL EXHIBIT 168
MEMORANDUM FROM MEA MEMBERSHIP SERVICES DEPARTMENT TO MEA BOARD OF DIRECTORS, LOCAL ASSOCIATION PRESIDENTS & UNISERV DIRECTORS
FEBRUARY 19, 1982
[Offered & admitted Jan. 14, 1986]

[MEA logo omitted in printing]

MEMO

To: MEA Board of Directors, Local Association Presidents, UniServ Directors

From: Membership Services Department

Date: February 19, 1982

Re: Preserve Public Education - Posters and Ads

Enclosed, you will find copies of each of the following posters:

Number	Title
1	Practically every decision affecting education is a political decision
2	Reading, writing, and freedom
3	Declaration of Independents
4	Debbie really wants to take that course

Poster #1 is designed for use internally, particularly in school building lounges as we seek to increase NEA-PAC and MEA-PAC enrollments and contributions.

Posters #2, #3 and #4 are designed to be used in the community. We suggest that you contact the various businesses in your area and ask them to display a poster (or all of the posters over the period of the next several months) in their business establishment.

Some of the businesses which you may want to contact in this regard, include: banks, barber shops/beauty parlors, drug stores, motels/hotels (particularly those where service clubs meet regularly) realtors, Chamber of Commerce, shoe stores, donut/-coffee shops, theatres, supermarkets, malls, hardware stores, gift shops, fast food establishments (i.e., McDonald's, Burger King), department stores and party stores (i.e., 7-11, Mini-Mart).

Posters may be ordered from the MEA Membership Services Department by calling: 800-292-1934.

Since quantities are limited, orders will be filled on a first call/first served basis. All posters will be shipped unfolded to enhance their display appearance.

Also enclosed are ad slicks in 4 different sizes (1 set for each of the posters described above) for use in local association newsletters, community newsletters, flyers and for advertisements in local newspapers.

The ads may be used, as is, or personalized by making a few minor copy changes to identify your local association.

[Enclosures omitted in printing]

PLAINTIFFS' TRIAL EXHIBIT 197
MEMORANDUM FROM MEA GOVERNMENT AFFAIRS DEPARTMENT, CHARLES ALEXANDER, KEN MacGREGOR & PAT DOLAN, TO PAC CHAIRPERSONS & UNISERV DIRECTORS
DECEMBER 8, 1981
[Offered & admitted Apr. 22, 1986]

[MEA Job Request form & logo omitted in printing]

MEMO

To: PAC Chairpersons and UNISERV Directors

From: Charles Alexander, Ken MacGregor, Pat Dolan

Date: December 8, 1981

Re: Formulation and Training of Screening and Endorsement (S&E) Committees.

1. Please form S&E Committees for House, Senate and Congressional Districts.

2. One person from each S&E Committee, preferably the chairperson, should attend the MEA Legislation/Political Action Conference, February 4, 5, and 6, 1982, for appropriate training. MEA will reimburse lodging, meals, and conference fees for this person.

The February Legislation/Political Action Conference will serve as the Kick-off for MEA's Election '82 Screening and Endorsement Process. We are asking that S&E Committees be designated and a person identified to attend training sessions at the February 4-5-6 Conference.

While reapportionment may result in eventual changes for some of our S&E Committees, we believe that these will be minimal and that we need to become involved in numerous campaigns early in this election year---we cannot wait for the reapportionment process to be completed before we get going.

MEA-PAC Policies establish the following prerequisites for the formation of S&E Committees:

1. Each Coordinating Council PAC totally, or partially within a Legislative or Congressional District is entitled to participate in the S&E process for that District.

2. Each participating PAC has an equal voice in determining the composition of the S&E Committee as well as its procedures.

3. A PAC may choose not to participate in the S&E Process.

4. A committee of from seven (7) to nine (9) is suggested.

Enclosed is a form to enroll a designee for each legislative or congressional district S&E Committee in the February 4-5-6 Legislative/Political Action Conference to be held at the Flint Hyatt Regency Hotel.

Sessions of interest to Screening and Endorsement persons will begin at 8:30 a.m. Friday, February 5, and continue through noon on Saturday, February 6. MEA will reimburse lodging on a double occupancy basis for Friday night as well as conference fees and meals for Friday and Saturday. Be sure to return the form to MEA Government Affairs by January 22, 1982. Each person is responsible for making their own lodging arrangements at the Conference.

Contact Ellen Champion if you have questions.

MEA Department of Government Affairs
12/8

cc: MEA Board of Directors
MEA Staff

[Enrollment form omitted in printing]

COORDINATING COUNCIL PAC

AD HOC SCREENING
AND ENDORSEMENT COMMITTEES

(For referral purposes throughout this booklet, the above Committee will be referred to as the "S&E" Committee.)

The "S&E" Committee has a specific charge - to examine and evaluate the current offices, incumbents, and candidates and determine whom to recommend as endorsed to the teachers and other citizens interested in education in that area as the person(s) most qualified. To determine which candidates are most apt to protect, maintain and support a strong public school system for the citizens of Michigan and the candidates most likely to support a strong teaching profession. It is a serious and important task regardless of the office - a local school board candidate, a candidate for the State House or Senate or a Congressperson.

WHEN TO START

Not later than April 15 of the even numbered years, each Coordinating Council PAC assigned a Michigan House of Representative's seat shall assume the administrative responsibility for scheduling a joint PAC meeting of all PACs whose teacher membership is contained wholly or partially within the legislative district for the purpose of establishing the House "S&E" Committee. (These procedures should also be followed in selecting and endorsing candidates for Michigan Senate seats.)

The following items should be placed on the agenda of the meeting for discussion and agreement:

That:

A. The "S&E" Committee, as the recognized Committee, has full authority to determine endorsement or non-endorsement of candidate.

B. PACs whose Coordinating Council membership is contained either wholly or partially within a "House" district have equal representation and share equally in the full endorsing process.

C. PACs recommend to MEA-PAC the contribution of not more than the maximum contribution limitation for endorsed candidates for State Legislature.[1]

D. PACs encourage individual voluntary teacher support of endorsed candidates.

E. Coordinating Council PACs communicate their endorsement of a candidate for State House and Senate exclusively to their teacher membership.

Each PAC, in caucus at this first joint meeting, should select from among its member delegates, representatives to serve on the House "S&E" Committee. Members of S & E Committees shall not be current members of the campaign staff of a candidate who is being considered by the "S&E" Committee. The size of the committee can vary depending on the number of PACs within the district. In order to assure adequate representation without overloading the committee, seven to nine members are adequate.

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[1]Coordinating Council PACs may recommend to MEA-PAC a contribution of up to $4,500.00 in a single election to an endorsed candidate for State Senate and up to $2,500.00 in a single election to an endorsed candidate for the office of State Representative.

After the members to the "S&E" Committee have been selected, they should meet together, immediately following the general meeting, and select a chairperson and secretary. The next step would be to examine the political demographics of the district, i.e., estimated number of registered voters, number of precincts, total votes cast in the last election, number of teachers residing in the district, voting records of the incumbent and determine as to whether the district is "safe" or "swing".

It is understood that no Coordinating Council PACs will make any direct cash or in-kind contributions to candidates for the offices of State Senator and State Representative. This does not preclude, however, individuals from privately volunteering services to candidate committees or from contributing the maximum contribution to candidates for State House ($250.00) and State Senate ($450.00) as long as PAC funds are not utilized.

It is recommended that following the election of the endorsed candidate the S & E Committee shall serve as a continuous liaison with the candidate so as to enhance communications, lobbying and performance.

Adopted by MEA-PAC Council May, 1977

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PROPOSAL RE: WOMEN/MINORITIES

...that the MEA-PAC Council Screening and Endorsing Committee shall question all screened candidates on voting records and/or campaign statements as they relate to the NEA and MEA resolutions on third world and women's concerns to ascertain whether or not such candidates' positions are consistent with NEA and MEA positions.

Adopted by MEA-PAC Council May, 1979

PLAINTIFFS' TRIAL EXHIBIT 529
MEMORANDUM FROM KAI ERICKSON TO MORRIS ANDREWS, WEA EXECUTIVE SECRETARY, & ATTACHED SUMMARY OF EDUCATION ASSOCIATION SERVICES TO MEMBERS, "BACKGROUND OF SERVICES"
JANUARY 4, 1975
[Offered & admitted Jan. 13, 1986]

[MEA logo omitted in printing]

PUBLIC AFFAIRS
MEMO

To: Morris Andrews, WEA Executive Secretary

From: Kai Erickson - Michigan

Date: January 4, 1975

Re: Organization of Services - UniServ

Mr. Ray Randels, MEA Associate Executive Secretary for UniServ - Michigan, requested I participate for him in a WEA program on the subject of services to teacher members. Specifically, he indicated his belief that it would be desirable to discuss why changes are needed in the NEA program of UniServ services to our respective members to improve these services.

Further discussion with Mr. Randels of this assignment led him to state that in his opinion the current NEA UniServ program needed revision. He suggested the most effective way to change this highly political program to better meet teacher needs might be through a series of experimental pilot programs - each for a specific period and with planned evaluation of the experimental program. Mr. Randels also indicated his belief that such experimental programs would better meet the service needs of teacher members because they could be individually adapted to the

peculiar needs of a state, a region or a geographic area and meet the increasing technical expertise required.

On the assumption that the UniServ program has received considerable publicity and heavy promotion while little discussion has appeared on several of the problems this program has revealed, I have attempted to identify several of those problems and suggest a modified way to service teacher members in the attached materials.

F/417/h

[MEA logo omitted in printing]

EDUCATION ASSOCIATION SERVICES TO MEMBERS

Madison, Wisconsin
January 4, 1975
Kai L. Erickson - Michigan

Background of Services

Most education associations have been in existence for over 100 years. Over that period of time their general purposes have not changed to any marked degree until the advent of collective bargaining. Now education associations refer to their past as consisting of two historical periods - Pre C.B. and Post C.B. (C.B. - collective bargaining).

With the acquisition of collective bargaining rights (and accompanying responsibilities) we are now in the process of attempting to develop the best manner by which we can provide high quality services to our respective members who, at this time, are principally teachers.

Prior to collective bargaining major education associations' services consisted of those typical of most common interest groups, i.e., communication between and among members,

representation before the legislature, and some public relation activities, both internally to promote membership and externally to project the members' goals. Lobbying, research, a journal or newspaper along with traditional annual state or regional conferences were both adequate and sufficient within the context of members' objectives Pre C.B. General goals were (1) to improve education (lobbying); (2) improve professional skills of members (conferences); and (3) improve welfare of teaching (lobbying and some research to help local teachers clubs plead for improved policies and benefits). All such services could be best provided from a central agency and required a strong and influential state organization. Direct consulting services to members came directly from state organization field representation in resolving individual dismissal cases, helping on millage elections and related affairs.

Collective bargaining arrived on the scene in the the middle and late '60's and had a dramatic effect on education associations. Membership previously had consisted of the total profession - teachers, principals, superintendents and higher education faculty in colleges of education. It has changed nearly overnight to now include only classroom teachers. Collective bargaining also created a legal and binding relationship between the local teachers' club and the local board of education. The local teachers' club was assigned the legal and binding responsibility to represent its members' interests in all wages, hours and working conditions. The state education associations immediately began intensive training of their local teacher leaders in the process of collective bargaining and grievance procedures - both concepts totally foreign and new to the education vocation. The state association, where bargaining had arrived, assisted each of its local affiliated units to enter into an exclusive contract between the local board of education and the local association. This has reduced the ability of the state to protect its members' needs because by law that responsibility now rests with the local association - good or bad, weak or strong.

At that point, NEA, in 1970 adopted a nation-wide program titled UniServ which provided a $7,500 subsidy to local groups of

teachers if they would raise sufficient dues to employ a professional person, a secretary and establish an office in the geographic area of the members served. Because NEA wished to strengthen local associations, conditions to participate required that for all practical purposes, the person be employed, supervised and evaluated by the local teachers being served.

This person was to provide a number of services to the members of the area who, as full-time teachers, were too busy to handle. NEA spent large sums of money to train this new super employee called a UniServ man/woman to be a person for all seasons - a skillful negotiator, trained arbitration advocate, community relations specialist, organization specialist, knowledgeable in state laws on education and federal law regarding teacher rights, a school finance expert, a political activist, a researcher and to possess a host of other accompanying skills, aptitudes, and abilities.

The national program adopted from an urban service program, started in large urban and suburban school districts, was then made available in that basic form to all teachers everywhere in the nation. Hawaii with one statewide school system, Utah with forty school districts, Illinois with 1,200 overlapping elementary and secondary school systems, New Jersey where 85,000 members live within two hours' drive of eacl. other, Idaho with its mountain ranges, and Nevada with its deserts. States which had traditional trade union bargaining laws - states that had hybrid meet and confer laws, and states where no rights were recognized for teachers.

Since a UniServ employee is equivalent to an elementary county school teacher that is a generalist - few efforts are made to employ attorneys, arbitrators, researchers, management specialists, political scientists or public relations personnel. The services are provided by former local teacher presidents or negotiators who, by professional trainir.g, were history, science, math and driver education instructors.

In each state where collective bargaining exists, UniServ personnel originally employed were basically negotiators since that was the highest priority in the education association then and still must be in a number of emerging states while processing of grievances became the second highest priority. Now we must examine the possibility that area-wide bargaining is the next logical extension from thousands of small school contracts. Many school districts are smaller than a medium-sized junior high building in an average-sized town. After the first rush of bargaining takes place, a degree of stability occurs under two and three year contracts, and aside from some legitimate grievance processing and perhaps some more just to keep busy, the employee now needs specialized diverse skills, aptitudes or abilities for the longer puli - public relations activities, political power development, perhaps even providing some inservice programs to help teachers become better teachers although the current term "advocate" certainly doesn't imply that activity.

At this point perhaps it would be helpful to step back and examine just what services the teaching occupation/profession actually requires in order to best maintain its ability to perform the teaching function, to best protect the professional and occupational interests and to be able to best maintain and improve their welfare regarding wages.

I believe American teachers or teachers of any nation need these services (they are not listed in any order of priority):

- Professional management of their resources - employees
- Good political leadership - democratically elected by secret ballot
- Competent legal services - advocates in the courts
- Skilled legislative representation - advocates in the legislatures

- Effective publications - journalism for internal cohesion
- Competent research - knowledge is power
- Various special function consultants - negotiations, grievance processing, P.R. specialists, troubleshooters, organizers, etc.

[Rest of exhibit omitted in printing]

EXCERPTS FROM PLAINTIFFS' TRIAL EXHIBIT 594
CONTENT ANALYSIS OF THE
MEA'S *TEACHER'S VOICE*, VOLUME 59
[offered & admitted Jan. 8, 1986]

CONTENT ANALYSIS:

THE MICHIGAN EDUCATION ASSOCIATION'S TEACHER'S VOICE

VOLUME 59 (Sept. 7, 1981--Aug. 16, 1982)

E. Scott Royce

December 16, 1984

[holographic notation[2]:]
CP Ex. 63
1-22-85

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[2]The notation "N.C." which appears in the "Col. In." column at various points throughout this exhibit also was holographic in the original. Other holographic marks which were not explained in the testimony were omitted in printing.

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COLLECTIVE BARGAINING -- GENERAL

Issue	Page	Material	Col. In.
9/7/81	1	"...and the Reality" -- deals with bargaining problems in Wayne County	40
	2	"Hmmm!", "It's a Long Struggle for Bargaining Integrity" (part), "2 Years: Labor Peace, Bargaining, No Pact" (part), "'Nuff Said" -- articles, photo items re Wayne County bargaining	43
	3	"Strikes, Unsettleds" (part) -- notes many districts resumed school without contracts	1½
	9	"Winning Smiles," "Contract Halts Unilateral Action" -- grievance report	30
	12	"Unsettled Units" -- list	21
	16	"The Hope..." -- photo related to p. 1 story	22½
9/28/81	6	"About Five Months Ago, the Nightmare Started..." -- grievance litigation report	44
	7	continuation of p. 6 article	14½
	7	"They're Lining Up to Join MESPA" (part) -- notes its bargaining work	1½

10/12/81	3	"Few Strikes, Many Unsettleds" (part) -- negotiation problems update	8
	4	"It's Millage for Total Program" (part) -- notes bargaining problems	4½
	12	"Many Unsettleds" -- continuation of p. 3 story	4
10/26/81	4	"W. Va. School Support Staff Win $1.3 Million in Back Pay" -- details	6
	12	"Sharing the Same Job" -- plug for article in 11/16/81 issue	9
11/16/81	3	"Finances, Other Issues Confront RA Delegates" (part) -- notes RA reaffirmation of importance of bargaining work	2
	5	continuation of p. 3 article (part)	½
	8	"Bargaining Workshop for Minorities, Women" -- details	5
	10	"MEA Platform, Resolutions" (part) -- MEA positions on miscellaneous contract-related matters	9
	11	continuation from p. 10 (part)	9
	13	continuation of p. 10 material (part)	6½
	14	continuation of p. 10 material (part)	27½
	16	"Job Shared--to Everyone's Benefit" -- discusses special contract arrangement	35

11/30/81	5	"Statewide Bargaining Workshop Geared for Local Presidents" -- details	3
	5	"By Edith Swanson" -- discusses year's bargaining activity	20
	7	"Preservation of Public Education" (part) -- notes past and future MEA bargaining plans	9
	12	"'Thanks to MESPA and a Fair Judge'" -- grievance litigation report	10½
12/14/81	2	"Non-Stop Bargaining for Coloma" -- update on unsettled districts	10
1/11/82	3	"MEA-Backed Pregnancy Right Advances" -- report on grievance-type case	4½
	4	"Readers' Opinion" (part) -- letter criticizing MEA grievance action, reply	9½
	11	continuation of p. 3 article	4
3/8/82	1	"A MABO Spells 'Progress'" -- re multi-association bargaining	10½
	2	continuation of p. 1 article (part)	14½
	5	"Yeshiva-Type Decision Favors High Ed Faculty," "While Kendall Faculty Awaits Ruling" -- re cases filed to uphold bargaining rights	19½
	6	"FEA Teachers' Top Priority is Job Security" -- notes contractual work by local union to ease layoff problem	20

3/8/82	7	continuation of p. 6 story (part)	11
	9	"Back to the Bargaining Table (Again) for Wyandotte Teachers" -- details	5
	12	"Showdown at Adrian College" -- report on another bargaining case similar to those noted on p. 5 of this issue	27½
3/22/82	2	"Agreement with Ford: Reciprocity" -- notes importance to education bargaining of proper understanding of Ford-UAW settlement	12
	2	"Flint, Teachers Take New Approach" (part) -- bargaining	10
	5	continuation of "Agreement" story from p. 1	20
4/5/82	5	"By Keith Geiger" -- column re bargaining goals, lessons of auto industry bargaining	20
	8	"1982 Bargaining" -- photo story re local bargaining convention to set goals	8
4/19/82	2	"By Edith Swanson" -- column notes need for bargaining "reasonable contractual protections for our jobs"	20
	4	"Dealing with Comparisons Between Teachers, Auto Workers" -- attempt to counter "'concession hysteria'"	8
5/3/82	2	"MESPAs, EAs Form One Council" (part) -- discusses bargaining activity in UniServ 14B/14C areas	4

5/3/82	6	"It's Taken Time--but Ferndale Has a Good Thing Going" (part) -- notes local waived contract provisions to help implement school integration scheme	1
	7	continuation from p. 7	1½
5/17/82	3	"Reopen Contract? Stop! Check Board Policy" -- re new requirement for specific MEA authorization to reopen contracts	12½
	5	"Lansing Schools EA Goes for Alternatives to Layoff" -- discusses job security contract provisions, problems	36
	12	"Supply-Demand Report: Finding Positions Will Remain a Challenge" (part) -- notes surplus of teachers, suggests bargaining work part of solution to the problem	13½
	14	"MEA Delegates Act on Many Business Items" (part) -- notes RA action re office of negotiations	½
6/14/82	2	"Act of Labor" -- photo story on MEA staff meeting held to prepare for bargaining	6
	5	"MEA Completes Staff Reductions" (part) -- notes creation of MEA office of research and bargaining	½
	5	"Input Needed on NEA Resolutions" (part) -- notes one resolution submitted deals with fringe benefits	½

7/19/82	7	"Kalamazoo City, County Teachers Are Unified" (part) -- notes bargaining background, implications	6
	8	"Putting 'Snap' In Bargaining" -- notes MEA bargaining aid to MESPA	4½
	11	"Incoming MESPA Group Wins Decision" -- re MERC ruling in bargaining case	10½
	12	"Full Jury Awards MEA-Backed Teacher $321,000 in Damages" (part) -- discusses MEA-backed grievance case	4
	12	"EA Faculty Achieves Gains, Helps College in Contract Opener" -- re bargaining at Saginaw State College	18
8/16/82	3	"MEA on Reopeners: It's Mostly 'Wait and See'"-- re MEA policy	20
	3	"Slow Bargaining This Summer; Geiger on Panel" -- bargaining report, report on creation of state council to improve communication in bargaining disputes	3½
	4	"Readers' Opinion" -- letter questions local union's contractual representation of some members	10
	6	"Leadership Conference for MEA, MESPA Local Leaders" (part) -- notes grievance work session conducted	6
TOTAL			779

COLLECTIVE BARGAINING -- FERRIS STATE

Issue	Page	Material	Col. In
There was no discussion of collective bargaining at Ferris State in the issues of Teacher's Voice examined.			
TOTAL			0

LOBBYING

Issue	Page	Material	Col. In
9/7/81	3	"Commission to Study School Quality" -- notes appointment of federal body, urges members to participate in its hearings	9½
	3	"Work Ahead of You, MEA" -- emphasizes need for lobbying "for public dollars"	8
	4	"...Is That What Poll Really Shows?" (part) -- notes NEA opposition to tuition tax credits	2 N.C.
	9	"Concern About Having Juveniles in Jails" -- notes MEA support for "juvenile code revision"	5 N.C.
	10	"Money Problems Await Legislature Sept. 15" -- details, MEA position re property tax relief	8

9/7/81	14	"The Chickens Are Starting to Come Home to Roost" -- criticism of Reagan administration budget/tax policy	14
	16	"It's For All of Us" -- plug for labor protest against Reagan budget policy	10½
9/28/81	1	"Solid on Solidarity Day" -- report on protest against Reagan budget policies	38
	1	"That's Incredible!" -- criticizes Michigan governor's budget plan	3
	4	"MEA Calls Milliken Proposal 'Incredible' " (part) -- attack on state budget proposal	18½
	5	"Ask Legislator About Cuts," "Retiree Bill Introduced in House" -- state legislation report, plug for lobbying	9½
	9	"80,000 MEA Members Needed at Solidarity Day" -- MEA president's comments on protest against Reagan policies	24
10/12/81	1	"60% of Michigan's Citizens" -- results from poll commissioned to help in MEA opposition to state legislation	40
	2	continuation of coverage of poll from p. 1	31
	3	"School Community Unites to Battle Education Cuts" -- discusses lobbying re state budget	25½
	12	"School Community Unites" -- photo story re MEA position on state budget	12½

10/12/81	12	"Watch Out" -- plug for material on p. 2	2½
10/26/81	1	"It's Time to Face Realities" -- deals with state tax relief legislation issue	42
	2	"The Word Goes Out" -- photo story on MEA poll results opposing tax relief legislation	20
	2	"Bill Halts Retiree Rollback" -- notes MEA support for state legislation	5
	2	"Summer Taxes--a Costly Headache" -- plug for state legislation	8
	3	"Now State Faces $270 Million Deficit" (part) -- details, slap at Reagan administration budget	6½
	4	"By Beverly Wolkow" -- notes MEA opposition to tax relief legislation	16
	4	"Readers' Opinion" -- letter supports lobbying for retirement-related legislation	6
	5	"Updating Voc Ed" -- notes upcoming hearings	4
11/16/81	3	"Finances, Other Issues Confront RA Delegates" (part) -- notes action on motions related to legislative measures	2½
	3	"MEA States Concern on Receiverships" -- notes union's attempt to lobby for state policy shift	8

11/16/81	5	continuation of "Finances" article from p. 3	2½
	10	"MEA Platform, Resolutions" (part) -- MEA positions re miscellaneous state legislative measures	15½
	11	continuation from p. 10 (part)	4
	12	continuation from p. 11 (part)	14
	13	continuation from p. 12 (part)	24½
	14	continuation from p. 13 (part)	7½
	15	continuation from p. 14 (part)	8½
11/30/81	2	"Political Action/Legislation Combines in MEA Workshop" (part) -- details	2½ N.C.
	3	"Blues Really Sock It to Retirees," "Bill Would End Blues Monopoly" -- promotes state legislative proposal	30
12/14/81	1	"One Bright Spot--Our Commitment" -- statement re state legislative plans	7
	4	"Bill Would Generate $90 Million for Retirement" -- discusses "MEA-backed bill"	5
1/11/82	2	"Legislation, Political Action Workshop Feb. 4-6" (part) -- details, registration form	5½ N.C.
	3	"Is Pension Fund Part of State 'Balancing' Act?" -- details	16

1/11/82	5	"Schools in Reagan's Shooting Gallery" -- criticizes Reagan, New Right legislative proposals	44
	11	"Voc-ed Hearing in Lansing Feb. 24" -- details	2½
	14	"Readers' Opinion--Retirement Benefits" (part) -- letter re MEA-backed state legislation	7
	14	"Tax Revenue Growth--Michigan Nears Bottom" -- discusses tax, spending matters	16
	16	"NEA Girds for Education Dept. Battle" -- details	16
1/25/82	1	"On the Outside..." -- notes union's opposition to tuition tax credits	16 N.C.
	2	"ERA Struggles to Win Only Three More States" (part) -- notes union's efforts to win state legislatures' ratification	13½ N.C.
	2	"Creationism Advocates Vow to Continue Fight" (part) -- notes NEA and MEA oppose "creationism" legislation, regulations	8½ N.C.
	3	"Restore State Funding, Says MEA" (part) -- notes policy re public school finance	4½
	3	"Preserve Public Education" (part) -- notes MEA program "to make public education the top legislative priority"	13

1/25/82	4	"Department of Ed Talks: But...but...but..." -- notes opposition to Reagan education policies	10½
	4	"Readers' Opinion" -- letters re some members' trip to state capital, opposition to union's approach to federal role in education	16
	5	continuation of "Readers' Opinion" from p. 4	2
	5	"Private Schools Tax Break Raises Questions," "'It Amounts to Attack on Public Education'" -- criticism of Reagan administration policy	19
	5	"By Beverly Wolkow" -- column re MEA's "preserve Public Education" campaign	20
	8	"Upgrade Higher Ed, Milliken Urges" -- report on governor's program	14
2/8/82	1	"Preserve Public Education" -- photos, plug for p. 6 article	18
	3	"Save Ed. Dept., Says NSBA" -- details	3
	4	"Creative Financing is 'Taxing'" -- suggests solutions to tax problem	7
	4	"Crisis, But No 'Sputnik' Response" -- hits Reagan administration policy	6
	6	"Preserve Public Education" -- articles re alleged need to boost state education funding	44

2/8/82	7	continuation of p. 6 material	44
2/22/82	1	"Meeting Head-on the Attacks on Education" (part) -- support by NEA head for teacher lobbying	21 N.C.
	2	"Riegle's Views" (part) -- notes Senator's legislative issues comments at MEA meeting	5 N.C.
	2	"Legisl., Political Action Conference Attracts Many" (part) -- details	2 N.C.
	2	"Destroy Public Ed Seems to Be Goal" -- attack on Reagan policies	12 N.C.
	3	"Bill Would Save Schools Millions of $" -- details	5
	3	"Reagan's Impact--It Hurts Schools" -- criticism of administration policy	19
	4	"Readers' Opinion" (part) -- letter, reply re retirement benefits, legislation	10½
	7	"Geiger: Bargaining Table is the Proper Place" -- response to MCEA legislative proposal	7
	10	"More Finance Burden Forced on Higher Ed" -- discussion of governor's proposal	14
	12	"No More Cuts" -- discusses education funding	29½
3/8/82	2	"This MABO Spells 'Progress'"(part) -- photo item re Congressional letter-writing campaign	8

3/8/82	3	"[illegible] State Funds for In-Service Training, PPE Top Priority" -- MEA views on education funding legislation	25
	4	"Readers' Opinion" (part) -- letter re previous feature on education funding	6
	4	"Retirement Hearings" -- details	3
	5	"By Beverly Wolkow" -- notes need for "a strong Association" to secure legislative backing for education	18
	12	"PPE" -- plug for upcoming article on MEA's "Preserve Public Education" campaign	9
3/22/82	1	"Preserve Public Education" -- photo items re MEA's push for higher state funding	41½
	3	"MEA: Schools Will Need Still More," "Listening: MEA, Legislators," "Who Will Share How Much of Tax Hike" -- report on state spending, tax proposals	40
	4	"Readers' Opinion" (part) -- letters, replies re legislative matters	17
	6	"Eaton Rapids EA Takes First Step Toward Preserving Public Education," "Truth-in-Taxation--What Impact?" -- re MEA push for higher state funding	44
	7	continuation of material from p. 6	44
	8	continuation of p. 3 coverage	6½

3/22/82	10	"Female Retirees Could Lose in Change to Erase Bias" -- urges members to lobby for its preferred way of resolving discrimination problem	14
	10	"Retirement Board Action Stirs Effort to Restructure It" -- MEA position on state legislation	16
	12	"After Jailing of 'One of Ours'"(part) -- notes union support for voting rights act extension	6 N.C.
	12	"Help, Help" -- plug for article in next issue related to MEA campaign to increase state education funding	9
4/5/82	1	"Dwindling State Support Explains Finance Problems" -- plug for higher state funding	36
	3	"School District Deficits Reflect Hard Times" -- more re state education funding	11
	3	"Deep Ed Cuts Face Balky Congress" -- notes federal lobbying by MEA, NEA	21
	4	"Readers' Opinion" (part) -- letter re need for more state education funding, second suggesting change in state law re length of school day/year	27
	6	"Becoming No. 1 Public Need," "MEA Seeks 50% Funding" -- articles about, supporting MEA's state education funding goal	44

4/5/82	7	continuation of material from p. 6	44
	8	"Writing Campaign Aims to Abolish Ed Dept." -- update on DOE issue	11
	8	"State Passes on Special Ed Costs" -- short critique of state policy	5
	10	"Michigan Has 'Block Grant Advisory Committee'"-- notes NEA opposes this funding concept	16
	12	"Voting March Has Michigan Ties" (part) -- re union support of voting rights act extension	4½ N.C.
4/19/82	1	"Historic 'First' for MEA, Higher Ed" -- notes meeting of Ferris State union officials, others to work out ways to seek more funding for higher education	15½
	3	"MEA Starts 'Preserve Higher Education' Efforts" -- more detail re p. 1 story	26
	3	"Proposed Legislation Means Pay Cut Through Pensions," "State Fiscal Integrity Awaits Senate Action" -- additional state legislation coverage	9
	4	"Delayed State Payments Means Delayed Payday" -- plugs MEA legislative proposals, including tax hike	7
	5	continuation of "Proposed Legislation" from p. 3	7

4/19/82	8	"Candidates for NEA Director Seats" (part) -- statement by T. Smith attacking federal spending priorities	8
	8	"'Arms Race--It's Death, Not Life'" -- notes attack on Reagan policy by NEA Executive Director	2½ N.C.
	10	"State Fiscal Integrity" -- continued from p. 3	14
5/3/82	3	"MEA Protests Ed Cuts" -- details	6
	3	Income Tax Vote," "Riegle Looks at Federal Aid if Michigan Goes Bankrupt" -- state, federal legislative news	10½
	4	"Tuition Tax Credits is an Unsound Proposition," "Reagan Budget Would Mean Job Loss" -- attacks on administration policy	23
5/17/82	1	"MEA Delegates Trim Dues Increase, Staff" (part) -- notes RA actions re state legislation	1½
	2	"Proving Effective: Telling Legislators," "Preserve Public Ed Coalition-Building Moves in Shiawassee" -- re education funding lobbying	38
	3	"MEA in Last-Ditch Effort to Save State, Schools" -- notes MEA lobbying for tax hike	14
	4	"How About That!" -- photo story re meeting of governor and MEA officials	9

5/17/82	4	"Readers' Opinion" (part) -- letter endorsing Reagan budget program	3½
	12	continuation of p. 3 article	10
	12	"Supply-Demand Report: Finding Positions Will Remain a Challenge" (part) -- notes surplus of teachers, suggests legislation is part of solution	13½
	14	continuation of p. 1 article (part)	3½
6/14/82	2	"Henderson-Distinguished Winner" (part) -- notes MEA joined in legislative coalition against redlining	1½ N.C.
	3	"ERA Faces June 30 Deadline," "Timing on State Budget Crucial" -- re MEA, NEA lobbying	16 N.C.
	4	"Check Out These New NEA Resolutions" (part) -- notes NEA convention will debate resolutions re federal, state, local policy, legislation	2½
	4	"Assault on Public Education a Major Concern" (part) -- notes lobbying, legislation on agenda of NEA convention	4½
	5	continuation of "Check Out" from p. 4 (part)	4½
	5	"By Beverly Wolkow" (part) -- notes importance of lobbying to protect retirement system	6½
	8	"Good News, Bad News" (part) -- re state legislation	1

6/14/82	8	"NEA Offers Retirees a Piece of the Action" (part) -- notes new membership plan encourages participation in NEA lobbying	2½
	12	"4-Day School Week Won't Work" -- notes MEA opposition to such proposals	4
7/19/82	1	"Legislature to Resume Budget Process in Aug." -- details	5
	1	"Payless Paydays Averted in 29 Districts" (part) -- notes state funding problem, MEA lobbying work	8
	3	"NEA Delegates Take Aim at Tuition Tax Credits" (part) -- notes NEA lobbying activity, legislative stands	6½ N.C.
	4	"ERA: Final Chapter is Coming" (part) -- notes defeat of amendment despite NEA lobbying support	7½ N.C.
	5	"MEA Input Into Career In-Service for Teachers" -- notes MEA input into state board of education policymaking	9
	6	"For Now--Fate of Schools Rests on Millage" (part) -- includes plug for MEA's position on higher federal, state education spending	4
	8	"Sturgis EA Generates Letters to Legislators" & "Letters" -- lobbying against education spending cuts	19
	8	continuation of p. 3 article (part)	3

7/19/82	8	uncaptioned photo story re MEA presentation to state government forum	4
	8	"Corrected List of Commission Members" (part) -- notes newly-elected MEA Legislative Commission members	½
8/16/82	1	"Needs, Financial Problems Really Collide" -- uses example of one district's problems to push MEA position on higher state education funding	39½
	3	"Michigan Tuitions Rise as State Support Declines" -- plug for higher state education funding	5
	4	"Appeal to Voters' Practicality and Win Them" (part) -- comments re legislative strategy	2 N.C.
TOTAL			1895½

ELECTORAL POLITICS

Issue	Page	Material	Col. In.
9/7/81	3	"20 of 22 District Renew Millage" -- election reports	10½
9/28/81	4	"MEA Calls Milliken Proposal 'Incredible'" (part) -- notes MEA opposition to 1980 state ballot proposition	3½

9/28/81	12	"MEA Board Supports Energy Petition" -- endorsement of ballot proposition petition drive	7
10/12/81	4	"Seeking What's Needed" -- notes local union's support for millage increase	9
	4	"It's Millage for Total Program (part) -- details	10½
10,26/81	3	"When Will Alpena Schools Reopen?" -- notes local union work on millage election	28
	3	"Now State Faces $270 Million Deficit" (part) -- notes MEA opposition to state ballot proposition in 1980	1½
11/16/81	1	"D.C. Voters Say: No!" -- notes NEA opposition to ballot proposition in D.C.	7½ N.C.
	1	"Strenuous Efforts to Stay Open" (part) -- millage election report	8
	1	"Countdown in Pontiac" -- notes local union involvement in millage election	24
	2	"By Keith Geiger" -- urges members to become active in electoral politics	20 N.C.
	2	"School Employees Crucial" -- notes local union work in millage election	21
	4	"Readers' Opinion" (part) -- letter criticizing MEA-NEA for promoting the "views of...one political party"	10½ N.C.

11/16/81	5	"Issue Confronts RA Delegates" (part) -- notes RA action on motion re publishing a questionnaire for members on candidates & issues	1½
	15	"MEA Resolutions" (part) -- MEA position on political activity by members	4 N.C.
11/30/81	2	"Go-for-It Strategy Pays Off" -- re millage election	17
	2	"Political Action/Legislation Combines in MEA Workshop" (part) -- details	2½ N.C.
	3	"Another Rockford Millage Likely" -- details	7½
	4	"Teachers Care is the Message" (part) -- information re millage, recall elections	6
	5	"Political Action Workshops Set" -- details	3 N.C.
	5	"GOP Mixer" -- photo story re GOP Educators Caucus activity	9 N.C.
	7	"Preservation of Public Education" (part) -- emphasizes importance of MEA "political action"	15
	12	"Pontiac Coming Together" -- discusses millage election work	6
12/14/81	3	"Harrowing Struggle to Keep Schools Open" (part) -- report on millage election problems	18

12/14/81	3	"Issues" -- photo story re MEA officials at Democratic conference	6 N.C.
	4	"Readers' Opinion" -- letters responding to 11/16/81 letter noted above	12
	4	"No Way to Decide on Agency Shop" -- re local union's election defeat	10½
1/11/82	1	"Glory, Hallelujah!" -- notes role of MEA in millage election	42½
	2	continuation of p. 1 article	5
	2	"Legislation, Political Action Workshop, Feb 4-6" (part) -- details, registration form	5½ N.C.
	2	"By Keith Geiger" -- notes MEA millage election work	22
	8	"Parental Agony in Seeing Schools Go Down," "It Took All--Parents and School Employees" -- notes union involvement in millage election	44
	9	continuation of p. 8 article	44
1/25/82	2	"ERA Struggles to Win Only Three More States" (part) -- notes union's election activities	1 N.C.
	3	"Preserve Public Education" (part) -- notes MEA plans to back "legislative candidates"	½

1/25/82	6	"Alpena Waits for Court While Buses Stay Idle" -- notes that "MEA has offered expert help in winning a millage..."	8
	8	"The Abominable Snowman" -- plug for article in 2/8/82 issue re utility costs initiative	9
2/8/82	1	"MEA Joins Petition Drive to Halt Automatic Utility Increases" -- cartoon, list of material on the subject in this issue	22
	8	"No Utility Hikes Without Hearing," "Concerns Prompt MEA Support of Petition Drive," "17% or 50%, Customers Get It" -- material about, in support of, initiative on utility costs	44
	9	copy of the initiative petition discussed on p. 8	44
	10	continuation from p. 9	44
	11	continuation of utility issue coverage from p. 8	44
2/22/82	1	"Meeting Head-on the Attacks on Education" (part) -- NEA president notes union's election plans	21 N.C.
	2	"Riegle's Views" (part) -- notes Senatorial re-election endorsement	5 N.C.
	2	"Barb Mason Helps Draft Nominating Procedures" -- notes MEA staffer "represented NEA concerns" on Democratic Party body	9 N.C.

2/22/82	2	"Legisl., Political Action Conference Attracts Many" (part) -- details	2 N.C.
	2	"Millage" -- photo story notes MEA legislative-political conference discussed millage election strategy	9
	3	"Special Elections Provide Opportunities" -- notes MEA-PAC endorsements	9 N.C.
	6	"Prescription for School Nurses" (part) -- notes leader of MASN, affiliated with MEA, is trying to "awaken the nurses politically"	3½ N.C.
	7	"Teachers Help Save Good Board" -- notes local union involvement in recall election	7
3/8/82	4	"Readers' Opinion" (part) -- letter critical of MEA stance on utility initiative	9
	7	"FEA Teachers' Top Priority is Job Security" (part) -- notes past election work	1
	9	"MEA's 1982 NEA-PAC Give Away" -- details	10 N.C.
	9	"Workshop Message--It Takes Everyone to Pass a Millage" -- re MEA workshop on "conducting millage elections"	10
3/22/82	4	"Readers' Opinion" (part) -- part of letter plugging political activity	1

3/22/82	8	"Election Result Says to School Employees: Get to Work!" -- report on special election loss, plug for political action	9 N.C.
4/5/82	2	"Millage Workshops" -- notes MEA participation	4½
4/19/82	4	"Drive Against Automatic Utility Rate Hikes Moves" -- initiative campaign update	8
	8	"Candidates for NEA Director Seats" (part) -- plug in P. Brown statement for political action	1½ N.C.
	12	"NEA-PAC Endorses 9 Congress Members," "NEA-PAC Give-Away--Everyone Aboard!" -- Michigan endorsements, political fundraising	22 N.C.
5/3/82	1	"Blanchard Gets MEA-PAC Nod for Governor" -- details	12 N.C.
	3	continuation of p. 1 article	5 N.C.
	3	"MEA-PAC at Work" -- photo story on gubernatorial screening committee	10½ N.C.
	6	"It's Taken Time--but Ferndale Has a Good Thing Going" (part) -- notes local worked to oust school board members who opposed federal integration scheme	3
	7	"Harper Creek Wins Big" -- notes MEA role in millage election	20

5/17/82	1	"MEA Delegates Trim Dues Increase, Staff" (part) -- notes RA actions re state ballot proposal, PAC contributions	1
	2	"NEA-PAC Giveaway Winners" -- details	6 N.C.
	3	"July 1 for Michigan Caucus" (part) -- re NEA-PAC fundraising	3 N.C.
	6	"Six Essentials to Pass Millage" -- ideas for running such campaigns	44
	7	continuation of p. 6 article	26½
	14	continuation of p. 1 article (part)	½
6/14/82	3	"Bucks for Blanchard" -- photo story on campaign contribution to gubernatorial candidate	10 N.C.
	4	"Assault on Public Education a Major Concern" (part) -- notes political action, fundraising on NEA's convention agenda	3
	5	"Input Needed on NEA Resolutions" (part) -- notes one urges support for unions's PACs	1 N.C.
	5	"By Beverly Wolkow" (part) -- notes importance of political action to protect retirement system	6½ N.C.

6/14/82	8	"NEA Offers Retirees a Piece of the Action" (part) -- notes new membership plan encourages retirees to aid NEA-PAC	2½ N.C.
	10	"Wicker Predicts Series of One-Term Presidents" -- speech on political matters to MEA function	9 N.C.
	12	"Utility Rate Proposal Headed for Nov. Ballot" -- update on initiative	17
7/19/82	1	"Vote" -- plug for endorsement-related materials in this issue	5½ N.C.
	1	"Payless Paydays Averted in 29 Districts" (part), "Millages Critical to Opening of 33 School Districts," uncaptioned photo story -- millage election situation, MEA participation in "millage workshops"	20
	2	"By Keith Geiger" -- gubernatorial endorsement	18 N.C.
	2	"Voting in Primary; Endorsements," "Endorsements for Legislature, Congress Races" -- urges members to vote for MEA-PAC choices	22½ N.C.
	3	"Education, Economic Vitality--Blanchard!", "Volunteer to Help Blanchard, Enjoy Yourself," "PAC Giveaway Nets $100,000" -- more coverage of the primary, fundraising	29 N.C.

7/19/82	3	"NEA Delegates Take Aim at Tuition Tax Credits" (part) -- notes NEA plans for a "voter registration and get-out-the-vote" campaign 'in this year's congressional elections"	1 N.C.
	4	"ERA: Final Chapter is Coming" (part) -- notes plans to oppose re-election of ERA opponents	2½ N.C.
	4	"Readers' Opinion" (part) -- two letters questioning MEA-PAC gubernatorial endorsement	12½ N.C.
	6	"For Now--Fate of Schools Rests on Millage" (part) -- comments re millage elections, strategies	40
	7	"Kalamazoo City, County Teachers Are Unified" (part) -- includes mention of PAC work	1 N.C.
	8	"PPE" -- photo story re PAC fund-raising	6 N.C.
8/16/82	4	"Appeal to Voters' Practicality and Win Them" (part), "About Alan J. Baron" -- speech on winning elections, background material on speaker	18 N.C.
	6	"August Critical for Renewals" -- millage update	3½
	6	"Leadership Conference for MEA, MESPA Local Leaders" (part) -- notes speech discussed on p. 4 above	3 N.C.
	8	"Winner" -- notes MEA-backed candidate won gubernatorial primary	4 N.C.

TOTAL 1167

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PUBLIC RELATIONS

Issue	Page	Material	Col. In.
9/7/81	3	"Help" -- photo story re MEA "public relations workshop"	2½
10/12/81	2	"Mark Jan. 17" -- re NEA-declared "National Day of Conscience for Public Education"	4
	12	"Hear Us!" -- photo story on meeting to explain union's position to the public	7
11/16/81	5	"Awards to Local EA PR Efforts" -- details	3½
	15	"MEA Resolutions" (part) -- MEA position on community p.r. work	2
11/30/81	1	"Talking with the People...and Not Just the Parents" -- discusses one local's community propaganda activities	40
	2	"Fitzgerald -- Extra Effort Needed" -- notes local's community p.r. work	22
	4	"Teachers Care is the Message" (part) -- union p.r. work in one district	6

11/30/81	6	"Help Our Schools Out" -- plugs members' participation in state's education p.r. operation	44
	7	continuation from p. 6	20
	12	"Cadillac EA Floats a Big Winner" -- re local union's p.r. work	16½
12/14/81	2	"'Day of Conscience' for Schools Jan. 17," "Let MEA Help You," "Freedom. Justice." -- re NEA p.r. campaign	26½
1/11/82	7	"'Marketing' of Schools in Macomb," "Reagan Budget Cuts to End Project's Funding" -- discusses p.r. campaign planned & executed by school district, union	44
	10	continuation of p. 7 coverage	32
	12	"Teachers Labor" -- re one local's p.r. activity	8
	16	"MEA Leaders on Television, Radio" -- more re NEA p.r. campaign	21
1/25/82	1	"On the Inside..." -- photo story re TV appearance of MEA official re National Day of Conscience for Public Education	20
2/8/82	3	"By Edith Swanson -- urges p.r.-type efforts	22
3/8/82	2	"Good Way to Build Community Support -- discusses p.r. work by multi-bargaining associations	16

3/8/82	9	"PR Conference Meets May 21-22" -- details re MEA gathering	3½
6/14/82	7	"'I've Been Back to School' Success in Ann Arbor" -- report on union p.r. tactic	29½
7/19/82	5	"An Idea from Charlotte Teachers for You to Try" -- recommends storefront displays	15
TOTAL			405

LITIGATION

Issue	Page	Material	Col. In.
9/7/81	10	"Benton Harbor Desegregation Starts; MEA Monitors on Behalf of Employee Concerns" -- notes MEA involvement in the case	22
11/16/81	1	"Strenuous Efforts to Stay Open" (part) -- notes MEA amicus brief in education funding suit	1
	3	"Finances, Other Issues Confront RA Delegates" (part) -- notes action on motions related to possible MEA litigation	2½
	11	"MEA Resolutions" (part) -- MEA position re court cases on teacher "control of the education process of the classroom"	1

11/30/81	10	"NEA Joins PATCO Lawsuit" -- details	12
12/14/81	3	"Harrowing Struggle to Keep Schools Open" (part) -- notes local union's intent to intervene in funding case	1½
1/11/82	3	"Court Stays Busing Order" -- notes MEA legal action in the case	16½
1/25/82	2	"ERA Struggles to Win Only Three More States" (part) -- notes NEA participation in ERA-related litigation	3½ N.C.
	2	"Creationism Advocates Vow to Continue Fight" (part) -- discusses creationism case in which Ark. Education Association was a party	4½ N.C.
4/5/82	5	"Suit Charges Sex Discrimination in Girls' Sports" -- notes MEA Women's Caucus is one of the plaintiffs	10
6/14/82	2	"MEA's Suit Makes State Pay" -- re retirement fund-related suit	3½
	5	"By Beverly Wolkow" (part) -- notes recent suit, importance of litigation to protection of retirement system	7
7/19/82	12	"Federal Jury Awards MEA-Backed Teacher $321,000 in Damages" (part) -- notes MEA aided "damage suit" by teacher	12
TOTAL			97

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ADMINISTRATIVE

Issue	Page	Material	Col. In.
9/7/81	6	"MSU Faculty Associates Files for Election" -- representation election report	12
9/28/81	7	"'They're Lining Up to Join MESPA'" (part) -- discusses the organization's work	28
	12	"Reports Are Due" -- reminder re locals' membership reports	2
10/12/81	3	"Herndon to Leave" -- NEA Executive Director's resignation announcement	3½
10/26/81	9	"Geiger Endorsed for NEA National Office" -- details	5
	12	"RA Meets Nov. 7 in Lansing" -- details	5
11/16/81	3	"Finances, Other Issues Confront RA Delegates" (part) -- describes actions re MEA budget, etc.	6
	5	continuation of p. 3 article (part) -- notes action on motion to eliminate future Fall Representative Assemblies	2
	6	"RA Supports Budget Action" -- notes RA debate re MEA budget, dues matters	15

11/16/81	8	"Membership Services Director is Appointed" -- details	7
1/11/82	4	"Readers' Opinion" (part) -- letter urging MEA to organize substitute teachers	6½
	12	"Ringstrom Heads Zone III" -- information re new UniServ director	7
1/25/82	3	"NEA Director Candidates Have April 6 Deadline" -- re filing deadline for candidacies	6
	3	"Restore State Funding, Says MEA" (part) -- notes UniServ realignment	3
2/22/82	4	"Readers' Opinion" (part) -- letter attacking the idea that non-members are entitled to the same benefits and services as members	7½
	6	"Prescription for School Nurses" (part), "MEA: Nurses Important," "Nurses Also Struggle for Identity" -- discusses MASN, which is affiliated with MEA	40½
	7	continuation of "Prescription" from p. 6 (part)	9
	8	"Survey on MEA Programs" -- results of poll of RA delegates and MEA board members re MEA goals and objectives	44
	10	continuation of "Survey" from p. 8	30

3/8/82	4	"Readers' Opinion" (part) -- letter re dues structure problems for teachers in job-sharing arrangements	7½
3/22/82	4	"Readers' Opinion" (part) -- letter urging MEA to reduce its own wasteful spending	7½
	8	"Attention NEA Delegates on Housing" -- information for NEA convention delegates	3
4/5/82	2	"MEA Board Recommends Budget" (part) -- re action on organization's budget	5
	3	"RA in 'Voice'"- re upcoming RA	3
4/19/82	1	"Coming Up: Representative Assembly" -- notes business it will consider	8½
	3	"Most Voters Oppose Cuts" -- mistitled article deals with whether released time for union work counts toward retirement	4
	7	"MESPA Assembly May 1 in Flint" -- details	14
	7	"Amendments to Constitution, Bylaws Proposed" -- list of proposals re dues, etc.	18
	7	"These New Business Items Presented to RA" -- list of proposals	12

4/19/82	8	"Candidates File for NEA Director Seats" (part) -- photos and biographies of candidates, comments by P. Brown on MESPA	23
	8	"MEA Board Proposes 2-Year Budget" -- details	9
5/3/82	1	"MESPAs, EAs Form One Council" -- re union reorganization	29
	2	continuation of p. 1 coverage	32
	2	"NEA Convention Forms Now Due" -- details	2½
	2	"RA in Next Voice" -- notes next issue will discuss RA activity	1½
5/17/82	1	"MEA Delegates Trim Dues Increase, Staff" (part) -- RA report, administrative matters	35½
	3	"Board Endorses Geiger for NEA Candidacy" & separate photo -- details	7½
	3	"July 1 for Michigan Caucus" (part) -- re caucus scheduled at NEA convention	2
	4	"Readers' Opinion" (part) -- letter endorsing candidates for MEA office	3½
	10	"Delegates Amend MEA Constitution" -- re RA's actions in this area	22½
	14	continuation of p. 1 article (part)	21½

5/17/82	14	"Announcement of Candidates for Statewide MEA Office" -- details	5
	16	"MESPA Sets Dues, Elects Officers" -- report on MESPA's RA	19½
	16	"Peggy Brown, Teasther Smith Elected Mich. NEA Directors" -- details re NEA Director, MEA commission elections	16
6/14/82	2	"Traverse Bay Intermediate Chooses MEA-NEA" -- representation election report	5½
	4	"Check Out These New NEA Resolutions" (part) -- urges input on resolutions to be debated at NEA convention	6½
	4	"Assault on Public Education a Major Concern" (part) -- notes basic details of upcoming NEA convention	1½
	5	"MEA Completes Staff Reductions" (part) -- details	7
	5	continuation of "Check Out" from p. 4 (part)	2½
	8	"NEA Offers Retirees Piece of the Action" (part) -- notes plan to offer them "benefits available to active members"	9
7/19/82	3	"Geiger to Run" -- notes MEA president running for NEA vice president	3½

7/19/82	7	"Kalamazoo City, County Teachers Are Unified" (part) -- details	37
	8	"NEA Blasts Tax Credits" (part) -- notes results of elections at NEA convention	1 N.C.
	8	"For Additional Details" -- notes NEA publication will have more details on NEA convention business	1½
	8	"Corrected List of Commission Members" (part) -- revised report on MEA RA election of commissions	4½
8/16/82	3	"MESPA Leaders Elected to Office of NEA Caucus," "Elected to MEA Executive Committee" -- details	6½
TOTAL			637½

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OTHER MATERIAL

Issue	Page	Material	Col. In.
9/7/81	3	"Lay-Offs Boost 'Average' Pay" -- discussion of salary statistics	6½
	4	"Readers' Opinion" -- letter re past article's literacy statistics, poem	9½
	4	"Higher Ratings in Four Counties" -- re state board of education poll	10½

9/7/81	4	"...Is That What Poll Really Shows?" (part) -- re poll on public education	10
	5	"Feeling That You're Doing a Great Job" -- interview with a short teacher	44
	6	continuation of p. 5 article	32
	7	"Educators Employment Liability Program" -- insurance information	44
	8	continuation of p. 7 material	44
	9	"Try Out Unit on Working Women," "Organization on Women in Ed. Admin." -- articles on teaching unit, educators' group	9
	10	cartoon	7
	10	"Teasther Smith's Technique on Videotape" -- notes on availability of tape of class	7
	12	"Energy-Saving Help Available" -- information on publication	6
	14	"Mark Your Calendar" -- meeting dates	7½
	14	"Caucus Seeks 'Man of Year' Nominees" -- details	3
9/28/81	3	"Late Pay Better Than No Pay" -- report on financial trouble in one district	12
	4	"Readers' Opinion" -- letter re past article on young teachers' ideas	8

9/28/81	5	"Readers' Opinion" (part) -- continuation of letter from p. 4	1½
	5	"MEA Help" -- photo item re p. 3 "No Pay" article	9
	5	"Mark Your Calendar" -- meeting list	4
	5	"Time to Register for Popular MEA Conference" -- re professional development gathering	6
	8	"A Thought for Solidarity Day" -- Gompers quotation	4
	12	"Self-Insurance Plan Frazzles College Faculty" -- report on one college's experience	20½
10/12/81	2	"No Transportation in 4 Districts" -- details on local cost cutting	9
	5	"Disabled Persons Week Oct. 25-31" -- details	6
		"SBE Secretary" -- information on state board of education official	2
	5	"Interest Goes Up Again on MEFSA Annuities" -- details	10½
	8	"Mark Your Calendar" -- meeting list	8
	10	cartoon	7

10/12/81	10	"UN Celebrates 36th Year," "Big Fall Art Conference," "Phys Ed, Health Meeting Nov. 12," "Workshop on Alternate Careers Nov. 1," "Urban Option Offers Energy Teaching Help," "Electric 'Lifeline' Rates for Subsistence, Conservation Go Into Effect" -- details	37
	11	"Consumer Ed" -- conference information	2
	12	"Job Listings" -- details	4½
	12	"Self-Insurance Falls Short" -- plug for upcoming critique	9
10/26/81	2	"Award Deadline Extended" -- re MEA women's award	2½
	2	"Ned Hubbell Directs SBE's 'Project Outreach'" -- discusses state board of education program	8½
	5	"Mark Your Calendar" -- meeting list	4
	5	"Schools Better" -- re NEA Reporter article	2
	5	"She's a Super Salesperson" -- re MEFSA sales operation	13
	6	"Beware the Pitfalls of Self-Insurance" -- discusses problems	44
	7	continuation of p. 6 article	44
	8	"1972 Grads Disillusioned" -- details	6

10/26/81	9	"Look Who's Playing Host" -- party for NEA leaders	16 N.C.
	9	"Labor Mediator Job Available," "Mathematics Conference," "Fire Safety Applies to All," "$30,000 for Energy Awareness" -- details	23
	12	"IPD Coming," "MEA Staffer Gets Award," "SAT Scores Firm" -- details	11
11/16/81	2	"Thompson to Manage GR Symphony" -- details	3
	3	photo item re upcoming IPD conference	1½
	4	"Cut by Reagan, Still Leading in In-Service" -- notes MEAers presentations to two education conferences	8
	5	"Issues Confront RA Delegates" (part) -- notes action on motion re study of school employees' retirement fund	1
	6	"MEA Targets Information to Unemployed Teachers," "Science Show Hits the Road," "Great Depression--No Closed Schools," "Harold Bennett Dies; Former Board Member" -- details	19
	6	Korpi Still Bargaining; Now It's with His Wife" -- re retired MEA field representative	10
	10	"MEA Platform, Resolutions" (part) -- MEA position re general educational matters	10½

11/16/81	11	continuation from p. 10 (part)	26
	12	continuation from p. 11 (part)	13
	13	continuation from p. 12 (part)	13
	14	continuation from p. 13 (part)	4
	15	continuation from p. 14 (part)	4½
	15	"Women's Caucus Honors Two," "Chance for Young Playwrights," "Mark Your Calendar" -- details	14
	16	"Big IPD Just Ahead" -- details	4½
11/30/81	3	"Swanson Will Represent NEA" -- re African teachers' gathering	2½ N.C.
	4	"Teachers Need Our Help, Says School Board Official" -- details	4
	5	continuation of p. 4 article	6
	5	"Energy Contest is Extended" -- details	3
	8	"'Aha!' is a Creative Series" -- re public TV show	5½
	12	"MEFSA Elects New Officers" -- details	6
12/14/81	1	photo feature re IPD conference	35½
	2	"Holiday Hours" -- hours for MEA-affiliated services	3½
	2	"Michigan Finalist" -- teacher of the year contest report	2

12/14/81	2	"Good News!" -- re MEFSA annuity program	2
	3	"A Thought Provoker -- comment re IPD conference	4
	4	"'Aha!' Series Gets New Name" -- update	2½
	6	"Mark Your Calendar" -- meeting list	5½
	8	continuation of p. 1 IPD conference coverage	41
1/11/82	2	"Double MEA Honors for Lansing Teacher" -- re award given at IPD conference	6
	3	"Help Offered on Workshops" -- retirement information	4
	6	"Sarah Goddard Power receives MEA's Distinguished Service Award," "Puls' Feature, 'Kathy,' in Teacher's Voice Wins National Honors," "MEA Shared-Funding Goes to 12 Local EA Professional Projects" -- details	44
	10	"Biggest Percentage of Movers Stay in Michigan" -- details	12
	11	"Computers in Learning Convention Coming Up" -- details	2
	12	"Mark Your Calendar" -- meeting list	4
	12	"Watch Reporter" -- re upcoming NEA Reporter article on investments	1½

1/11/82	14	"NEA Tax Guide Ready" -- details	3
	14	cartoon	6
1/25/82	2	"Big Type" -- photo story re copier which enlarges	13
	3	"An Award for Teachers from One Who Cared" -- re John E. Oster Memorial Fund award	14
	4	"Make Use of Law Day" -- details re 25th observance	3½
	5	"Mark Your Calendar" -- meeting list	3
	6	"Wildlife Packets Ready" -- notes availability of materials re National Wildlife Week	3½
	6	"SDE Lays Off Staff" -- details	6
	7	"Job Listings" -- details	4½
	7	"New Rules for Students" -- notes new state guidelines	6½
	8	"Retirement Benefits Depend on Locale" -- comparative figures	18
2/8/82	12	"Los Angeles Has Openings for Teachers" -- details	4½
2/22/82	3	"Counselors Invite You to Nat'l Meet" -- details	4
	3	"Now, for the Good News" -- report on student behavior in Fla.	4

2/22/82	4	"Readers' Opinion" (part) -- 2 letters, replies, re basis of comparative figures in 1/25/82 article	12
	7	"Prescription for School Nurses" (part) -- discusses their general duties, scarcity of male ones	13
	7	"March Deadline for MEA Awards" -- re 2 such awards	6
	7	"NEA Regional IPD Meeting--You're Invited" -- details	2
	9	"Job Listings" -- details	6
	12	"Tuned In" -- plug for upcoming article re radio show run by 2 teachers	8
3/8/82	1	"A Teacher-Run Radio Show Reaches Out to Parents" -- photo item	12
	5	"Regional MIP Seminars Scheduled" -- details	6½
	6	" A Radio Talk Show Aimed at Parents" -- details	24
	7	continuation of p. 6 article	32
	9	"MEA Awards and Conferences Coming Up" -- details re 2 awards, women's leadership conference	6
	9	"Women's Hall of Fame Fundraiser Set" -- details	9½
	11	"Mark Your Calendar" -- meeting list	2

3/8/82	12	"Job Listings" -- details	3½
3/22/82	4	"Readers' Opinion" (part) -- part of letter re grammatical errors in past issues	4½
	5	"Teaching Further from Home; Blame Job Market" -- miscellaneous statistics	24
	8	"Workshops on Early Childhood Education," "Conference on Working with Refugees," "Teeth Treated, Courtesy Delta," "Mark Your Calendar" -- details	13
	10	cartoon	7
	10	"Pension Funds Into Mortgage Loans; Called Good Investment" -- details	7
4/5/82	2	"Third World Conference Set April 23-25" -- details	4½ N.C.
	2	"Plan to Check Out MEA's Art Exhibit" -- details on exhibit	10½
	2	"Schools Better Than Ever Says Accreditation Vet" -- details	9
	2	"MEA Board Recommends Budget" (part) -- notes MEA financial assistance to other groups	10½
	3	"Get Those Cycles Out for Bike-to-Work Day" -- details	6
	4	"Readers' Opinion" (part) -- complaint re in-service programs	3

4/5/82	5	continuation from p. 4	9
	8	"'Say Yes to Michigan' Week in May," "'Project Find Month' 'to Meet Special Ed Needs" -- details	20
	12	"Energy-Efficient House for Sale," "Job Listings" -- details	19
	12	"Reading" -- plug for upcoming article on a reading program	9½
4/19/82	1	"Gladwin Reading Program" -- photo item plugs p. 6 story	17½
	2	"See MEA Art Show; You Have Until May 28" -- details	24
	4	"Readers' Opinion" -- letter criticizing MEFSA, reply noting it is a "self-supporting corporation"	7
	5	"Nominees for Filmdom's Oscar" -- details	21
	5	"Teacher, Family Battle to Save Historic House" -- details	16
	6	"Reading Sweeps Gladwin" -- re reading program	44
	12	"That Hat!" -- photo story re MEA women's leadership conference	8
	12	"Progressive Educators to Meet," "Job Listings" -- details	10
5/3/82	2	"Survey Shows School Support" -- re state government poll	4

5/3/82	3	"Church-State Issue Awaits Court" -- re challenge to state regulations by church-run schools	9
	4	"Three Bay City Teachers Receive NEA's Maehling Grant" -- details	4
	5	"School-Age Parents Program Saves Dollars" -- details	8
	12	"MEFSA Offers 15% IRAs," "Some Current Job Listings to Check Out" -- details	27
	12	"Being Neighbors" -- plugs forthcoming article on food co-op	9
5/17/82	4	"Readers' Opinion" (part) -- letter re in-service education	14
	5	"Crash Fatal to Bay City EA Leader," "School Employees Help Steelworkers" -- details	8
	7	"MEA Leaders: Aug. 4-6" -- re summer conference	5½
	7	"Winners, Losers in State Unisex Mortality Table" -- details	12
	8	"Neighborliness Pays Off for Lansing Junior High" -- re food co-op	44
	9	continuation of p. 8 article	44
	10	"Was It a School, Business, or ????-- History Reveals" -- re background of Johannesburg building	14

5/17/82	12	"Jobs Listed in Several States" -- details	7
	13	"EA, School Jointly Plan, Fund In-Service," "NEA Honors Grand Rapids TV Station" -- details	8½
	14	"G.R. TV Station Wins NEA Award" -- details	3
	14	"Seven Are Honored at RA" -- re MEA awards	8
6/14/82	1	"Erma Henderson Receives MEA's Highest Award" -- notes award given Detroit politician	25½ N.C.
	1	"Learning Continues Despite Adversity" -- story on one teacher's problem with poor classroom conditions	16
	2	continuation of Henderson-related article from p. 1 (part)	18½ N.C.
	2	"MESSA Has New Prescription Service" -- details	9
	3	"MESSA Will Aid I d-Off Teachers," MEA Presents Awa ds to Business and Industry" -- details	15
	5	"Playwrights Honored" -- details	3½
	6	"Kalamazoo Teachers Aim at School Problems" -- re disciplinary problem solutions	44
	7	continuation of p. 6 article	14½

6/14/82	8	"MESSA Raises Rates" -- details	6
	8	"Good News, Bad News" (part) -- notes retirement system changes	23
	12	"Current Job Listings Here and Away" -- details	12
	12	"MEA Awards School Bells" -- re awards to journalists	7 N.C.
7/19/82	2	"Aug. 4-6 for Leaders" -- re summer conference	3½
	4	"Readers' Opinion" (part) -- letter attacking "inept thinking and wretched, pseudo-literate language usage" in the publication	7½
	5	"Students Pinpoint Financing as a Problem" -- student poll results	20
	10	"Job Listings" -- details	18
	12	"Know Anyone Who Has Been Helped by Our Job Listings?" -- discusses this feature	6
8/16/82	3	"Voc-Ed Grads Get Jobs Despite Tight Market" -- details	5
	6	"Alaska Bush Offers Jobs," "Texas Teaching" -- re out-of-state job opportunities	6½
	6	"Leadership Conference for MEA, MESPA Local Leaders" (part) -- notes summer conference held	9

8/16/82	8	"Job Listings" -- details	8
	8	"Help! Many Teachers Are Being Reassigned" discusses their problems	28
TOTAL			1977

PLAINTIFFS' TRIAL EXHIBIT 604
RESUME OF STEVE H. HANKE, Ph.D.
[Offered & admitted Jan. 14, 1986]

- RESUME -

GENERAL

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Birth Date: 29 December 1942

Family: Married, Two children

EDUCATION

1964 B.S. University of Colorado
Boulder, Colorado

1969 Ph.D. University of Colorado
Boulder, Colorado

PROFESSIONAL EXPERIENCE

Academic Appointments

1966-1969 Instructor (1966-68)
Assistant Professor (1968-69)
Colorado School of Mines
Golden, Colorado

PROFESSIONAL EXPERIENCE
(Continued)

1974-1975 — Visiting Associate Professor
Graduate School of Public Policy
University of California, Berkeley
Berkeley, California

1969-Present — Assistant Professor (1969-73);
Associate Professor (1973-75);
*Professor of Applied Economics
(1975- Present)
The Johns Hopkins University
Baltimore, Maryland 21218
(on leave: 1974-75, 1979-80,
1981-1982 and 1983)

Public Sector Appointments

1976-1980 — Member
Governor's Council of Economic Advisors
Annapolis, Maryland

1981-1982 — Senior Economist
President's Council of Economic Advisers
Washington, D.C.

1984-Present — Senior Economic Advisor
Joint Economic Committee
U.S. Congress
Washington, D.C.

Private Sector Appointments

1977-1980 — Chief Economic Advisor
Binnie and Partners - Consulting Engineers
London, England

PROFESSIONAL EXPERIENCE
(Continued)

Research Appointments

1978 — Visiting Scholar
Centre de formation internationale a la gestion des ressources en eau
Sophia Antipolis, France

1979-1980 — Associate Research Scholar
International Institute for Applied Systems Analysis
Schloss Laxenburg, Austria

1981 — Distinguished Visiting Scholar
Lund Institute of Technology
University of Lund
Lund, Sweden

1983 — Senior Fellow
The Heritage Foundation
Washington, D.C.

1984-Present — Senior Fellow
Manhattan Institute for Policy Research
New York, New York

Other Professional Appointments

1975-1978 — Member
Editorial Board
Land Economics

1975-1979 — Associate Editor
Water Resources Research

PROFESSIONAL EXPERIENCE
(Continued)

1980-1982 — Economics Editor
Water Engineering and Management
(formerly *Water and Sewage Works*)

1981-1982 — Member
Editorial Board
Water Resources Bulletin

1981-Present — Member
Advisory Council
Political Economy Research Center
Bozeman, Montana

1982-Present — Member
National Advisory Board
American Land Alliance
Mountain View, California

1982-Present — Member
Advisory Board
Reason Foundation
Santa Barbara, California

1982-Present — Fellow
The Institute for Humane Studies
Palo Alto, California

1982-Present — Adjunct Scholar
The Heritage Foundation
Washington, D.C.

1982-Present — Adjunct Scholar
The CATO Institute
Washington, D.C.

PROFESSIONAL EXPERIENCE
(Continued)

1983-Present — Associate Editor
Water Resources Bulletin

1983-Present — Member
Editorial Board
The CATO Journal

1983-Present — Member
Advisory Board
Local Government Center
Santa Barbara, California

1983-Present — Member
Board of Advisors
Center for the Study of Market Alternatives
Caldwell, Idaho

1983-Present — Member
Board of Advisors
Journal of Austrian Economics

1983 — Regular Commentator
"Perspective on the Economy"
(The Manhattan Institute's nationally syndicated radio program)

1983-Present — Associate
The U.S.-Japan Study Center
School of Advanced International Studies
The Johns Hopkins University
Washington, D.C.

1984-Present — Member
Academic Advisory Board
Manhattan Institute for Policy Research
New York, New York

PROFESSIONAL EXPERIENCE
(Continued)

1984-Present Member
Advisory Board
Export Today

[Listing of publications omitted in printing]

EXCERPTS FROM
PLAINTIFFS' TRIAL EXHIBIT 612
***TEACHER'S VOICE*, VOL. 59, NOS. 1-20**
[Offered & admitted Jan. 8, 1986][3]

***TEACHER'S VOICE*, VOL. 59, NO. 4, OCTOBER 26, 1981**

[1]Teacher's Voice analysis

It's time to face realities

LANSING

Governor Milliken has backed away from what some news media has described as his version of "Reaganomics" for Michigan—a cut in property taxes.

Questions may remain about why he made the proposal in the first place. But there seems little question that his backing away had to do with looking directly at Michigan's harsh economic realities—declining revenues and escalating human service needs, both due to a crippled economy.

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[3]The entirety of *Teacher's Voice*, Vol. 59, was admitted. Only excerpted articles are here printed. The issue number and date, and original page numbers (in brackets), are indicated for each article.

About the only thing left, as one of the state's major dailies pointed out, was for the Legislature to face the economic realities too. By that it meant dropping the foolishness of fiddling with tax cut schemes and moving forward to economic redevelopment plans.

MEA announced its opposition immediately after the governor made his tax-cut proposal public and quickly found itself part of a coalition of a united school community in opposition to tax cuts that will cost public schools.

Consistent posture

For several years, now, MEA has maintained a consistent posture in opposing tax schemes or cuts that would harm public school financing. In doing so, it has had to politically beat back the onslaughts of those who demand tax cuts regardless of costs. And it had to fend off, virtually alone last spring, the nay-sayers who argued that some tax cut was absolutely essential to stop the anti-tax drive.

Now, with some facts uncovered and some realities too harsh for politicians to ignore, MEA no longer finds itself alone.

A recent economic study done under the direction of the University of Michigan has produced data that fail to support charges that Michigan's taxes are unduly burdensome and unfair. The report concluded that the state's tax structure ranks second only to Hawaii's in fairness, balance, and structure.

Property taxes in Michigan, found the report, are slightly higher than the national average, but it found "little substance to claims that property tax burdens on the state's residents have been increasing in recent years."

The study noted that Michigan voters have rejected a number of property-tax reduction plans in recent years and said that the tax slashers consist of a "small, well-organized, very vocal minority of people."

The study also found that public K-12 and higher education have been the biggest losers in the competition for state resources.

A recently completed public opinion survey commissioned by MEA found a majority of Michigan citizens are "very unlikely" to support tax cuts that would reduce funds for schools. A majority of Michigan citizens also give a "good" or "excellent" rating to their local public schools.

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[12] RA meets Nov. 7 in Lansing

LANSING

The MEA's fall Representative Assembly (RA) will open at 9 a.m. Saturday, Nov. 7, at the Lansing Civic Center.

It will consider MEA's Platform and Resolutions, which state the MEA's position on various issues, and MEA's Goals and Objectives, which determine the use of MEA resources.

Delegates will also consider several new business items having to do with coordinating council organizational structure and Uniserv ratio. Other new business items may be introduced.

The E. Dale Kennedy award will be presented to local associations recognized for outstanding public relations programs and the MEA Women's Caucus will make its "outstanding man of the year" award.

The RA will adjourn later the same day.

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Strikes to date

Districts	1st day strike	Last day strike
Sanilac ISD	9-1	9-9 T.A.
Allegan	9-1	9-3 T.A.
North Central	9-1	9-1 T.A.
Munising	9-1	9-4 T.A.
Decatur	9-2	9-18 T.A.
Huron Valley	9-8	9-18 court order
Walled Lake	9-8	9-11 T.A.
Fraser	9-8	9-10 T.A.
Madison Heights	9-8	9-18 T.A.
Chippewa Valley	9-8	9-17 court order
Royal Oak	9-11	9-21 T.A.
East Jackson	9-16	9-18 binding fact-finding
Springport	10-15	

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TEACHER'S VOICE, VOL. 59, NO. 5, NOVEMBER 16, 1981

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[3] Finances, other issues confront RA delegates

LANSING

Fall Representative Assembly delegates obviously had MEA expenses, the pocketbooks of members, and anticipated losses of members due to layoffs very much on their minds.

However, they rejected all proposals to direct certain program [insert omitted in printing] cuts or to put limits on dues increases as they met Nov. 7 in the Lansing Civic Center. (See separate article.)

(MEA will come to the end of a two-year budget next year. The RA sets the MEA budget and dues in the spring.)

Delegates established MEA goals and objectives as recommended by the MEA Board of Directors. These goals and objectives determine MEA's priorities in developing programs and the budget.

MEA's highest priorities for 1982-84 as adopted by the delegates:

"To advance the welfare of its members by continuing:

—To provide bargaining representation and contract maintenance;

Legal rights

—To protect the legal rights of its members and locals;

—To effect changes in the political climate of the state to allow favorable fiscal reform for financing public education; and

—To improve education and the profession."

Delegates also adopted MEA's platform and resolutions, which state MEA's position on various issues. (See the platform and resolutions, starting on Page 10.)

Delegates reaffirmed MEA's position on its bargaining philosophy, goals, and objectives.

Here is a summary of RA business with the exception of items relating to budget and reorganization.

Passed:

—MEA opposes House Resolution M calling for a constitutional convention to consider an amendment to ban abortion. The resolution is sponsored by Rep. T. Stopcznski (D-Detroit). Submitted by Sammy Ruetenik of the MEA Women's Caucus.

—MEA will condemn Judge Halstead's manipulation of the judicial docket and hearing assignment and ruling in prohibiting an abortion for a repeatedly raped 11-year-old Kalamazoo girl. The judge is Kalamazoo County Juvenile Court Judge Donald Halstead. Submitted by Sammy Ruetenik of the MEA Women's Caucus.

—MEA will contribute 5 cents per member to the ERA campaign. Request from the NEA approved by the MEA Board of Directors.

—MEA supports legislation to guarantee a merging of seniority in cases of school consolidations and annexation. Submitted by the Region 7 presidents.

—MEA supports a program that clearly indicates that the homestead property tax is a rebate on property tax and not on income tax. Submitted by the Region 7 presidents.

—MEA will study the feasibility of joining a suit challenging the constitutionality of the current state aid formula. Submitted by the Region 5-9-12 caucus.

Suit study

—MEA's legal staff is directed to study the possibility of a suit related to the Legislature's stated constitutional responsibility to maintain public education. Submitted by the Region 5-9-13 caucus.

—The right of any coordinating council to continue as a one-person staff coordinating council after reorganization if affirmed. Submitted by Bob Metzger of Region 9.

Defeated:

—Would have directed the MEA executive director to consider the feasibility of MEA teachers withdrawing from Social Security. Submitted by Region 8.

—Would have provided for

*Continued on Page 5

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[5]*Issues confront RA delegates

*Continued from Page 3

expiration of boycotts one year after approval unless reaffirmed by delegates. Submitted by the Region 5-9-13 caucus.

—Would have directed MEA and affiliates to seek written policies related to counseling of students facing military careers and draft registrations. Submitted by David W. Jones of the Kalamazoo Education Association.

Work life

—Would have made "quality of work life" programs a high MEA priority. Submitted by the Region 7 presidents.

—Would have supported legislation empowering local boards of education to impose millages without a vote. Submitted by the Region 7 presidents.

—Would have directed MEA to explore alternate uses of surplus classrooms and school buildings. Submitted by Richard Schultz of the Region 5-F coordinating council.

—Would have called for MEA to fund an acutarial study of the Michigan Public School Employees Retirement Fund. Submitted by John F. O'Brien of Region 10.

—Would have directed the MEA Board of Directors to make preparations for the possible elimination of the fall Reparesentative Assembly. Submitted by Clyde McQueen of Southfield.

—Would have directed *Teacher's Voice* to publish a questionnaire listing the issues and political candidates. Readers would fill out and return the questionnaires and *Teacher's Voice* would publish the results. Submitted by the Carrollton Education Association.

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TEACHER'S VOICE, VOL. 59, NO. 6, NOVEMBER 30, 1981

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[2] Political action/legislation combines in MEA workshop

EAST LANSING

MEA is combining its political action and legislation workshops into one conference.

It will be Feb. 4-6 at the Flint Hyatt-Regency.

The conference will attract MEA leaders and members from throughout Michigan to discuss issues related to MEA's legislative and political action programs.

Workshops are scheduled on the following issues: school finance, tax cuts, retirement, and student conduct. Other workshops are scheduled on running millage elections, screening and endorsing procedures for political candidates, and policy issues at the State Board of Education (SBE).

Special sessions are planned for NEA legislative contact teams and for representatives of the MEA Council of State Organizations (COSO). This council includes organizations affiliated with MEA and generally organized around education disciplines, etc.

More information is available from MEA's Government Affairs Department.

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[7]MEA's mission

Preservation of public education

EAST LANSING

The very preservation of public education has emerged as a central issue as an MEA staff task force assesses MEA members' needs of the 80s and what to do about them.

This observation is by MEA Executive Director Beverly Wolkow, who declared MEA's intention of moving aggressively to tackle today's problems faced by public school employees.

"Given Michigan's current economic problems, how do we maintain, even improve conditions for members?" is the question before the task force, said Wolkow.

Until recently the answer to that question has been relatively simple. It was, in large measure, to have experienced and skilled MEA staff at all local bargaining tables to assure that the gains sought by teachers were successfully bargained.

That has worked exceedingly well, said Wolkow, but now issues are much more complex and difficult and are related to even the survival of public education.

Redouble efforts

The staff task force, according to Wolkow, has perceived that bargaining prowess alone is no longer sufficient. Local associations and MESPAs will have to redouble and improve their efforts, with MEA help, to build a membership that understands the issues and supports actions by their local bargainers to deal with those issues.

Secondly, MEA must motivate and teach public school employees to use all the contacts they have in their communities to enhance and maintain support for local public education.

In dealing with the bargaining process itself, the staff task force is looking toward MABOs (multi-association bargaining organizations) or similar arrangements to give bargaining the strength and coordination that has become an absolute "must" in achieving local success.

These strategies related to bargaining are moving ahead now. Coming on their heels, said Wolkow, are strategies in another area of critical importance: political action.

Many races

Next year many races are coming up—for Congress, the state Legislature, and for the governorship, in addition to other local and statewide races.

"Therefore, it is absolutely crucial," said Wolkow, "for MEA-NEA to have the funds and resources to win the election of friends of education."

This means getting all public school employees—MESPA personnel as well as teachers—involved and integrating MESPA into the local PACs.

"The task force," said Wolkow, "is looking for strategies that will have the same significant impact on MEA's political action as MABOs have had on bargaining."

In January MEA staff will receive training on finding and involving volunteers in political action. The task force is seeking alternate ways of raising political funds.

MEA-NEA must have the money to permit the maximum funding allowable from public school employee PACs, for candidates who support public education.

Opponents of candidates who support public education often are wealthy or are supported with a cascade of funds from various financial interests. An example was the costly 3rd District Congressional race in 1980 in which the reelection of Howard Wolpe, a friend of education, was challenged by a millionaire. NEA-PAC provided $7,000 to help Wolpe win.

"We are having to deal quickly and now with bargaining and political action," said Wolkow. But the remainder of MEA programs—in professional development and human rights and membership and organizing—will be subject to planning so that they also will contribute to meeting the needs of MEA members in the 80s.

MEA's strength, pointed out Wolkow, remains in its total programs and services to members. MEA also has a leadership role to fulfill in assuring that public education in Michigan survives and once again thrives.

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TEACHER'S VOICE, VOL. 59, NO. 7, DECEMBER 14, 1981

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[2] **'Day of Conscience' for schools Jan. 17**

EAST LANSING

A National Day of Conscience for Public Education, sponsored by NEA to focus attention on the importance of education, is scheduled Jan. 17, 1982.

"So much of what has made this nation great is based on public education," said NEA President Willard McGuire. "But today our quality public education is threatened. That's why NEA and our 1.7 million members will be mounting a number

of activities designed to help communicate to the general public the pressing need to get involved in supporting our public schools."

Activities include news research reports on the impact of cutting education dollars at the federal level. public service announcements in the various media by key national leaders supporting public schools and full funding for education, and a national poster contest for K-8 grade students.

The decision to participate in the poster contest is up to each local EA. A participating EA will choose its own contest winner(s) and select one winning poster to send to NEA to represent its community in the national contest. Local winners must be chosen by Jan. 17 and received by the NEA by Feb. 1, 1982.

The winner and his or her teacher will be brought by the NEA to Washington at a time to be worked out in the spring. As guests of NEA, they will visit key congressional leaders and the federal education department and be interviewed for a story in an NEA national publication.

More information regarding the poster center will appear in an upcoming *NEA Now*, the NEA's newsletter to local EA leaders throughout the country.

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TEACHER'S VOICE, VOL. 59, NO. 9, JANUARY 25, 1982

[3] **Today's challenge**

Preserve Public Education

EAST LANSING

Preserve Public Education!

That's the tall order and challenge for the 1980s and you as an MEA member will be hearing a whole lot about that important concept in the months ahead. Just three little words but with serious implications:

—for the well-being of K-12, community college, and higher education programs in Michigan.

—for Michigan students who need a well-rounded education to be able to compete in an increasingly complex and competitive world.

—for state residents who recognize a good public education program is essential for everything from maintaining property values to helping Michigan climb out of its current economic slump.

Preserve Public Education, a program approved by the MEA Board of Directors, will focus and expose those areas that need change as well as explain what the MEA, as an organization, and you, as an MEA member, can do about it.

The goal is as basic as basic can get--to make public education the top legislative priority so that adequate financing is restored to K-12, community college, and higher education budgets.

List the cuts

Consider the cuts that have occurred in your own local district in the past few years—cuts in arts and science programs, transportation, building maintenance, special ed, etc.

The Preserve Public Education program requires teacher and citizen involvement—from something as simple as telling parents and other residents about the positive things that happen in schools nearly every day to actively supporting a change in the funding of the school aid formula so that the state starts to pick up its fair share of the public education tab.

The program will also involve support of legislative candidates who recognize that public education should be a top legislative priority.

To achieve results it will require the cooperative efforts of MEA staff, MEA members, and others willing to support this program. Future issues of *Teacher's Voice* will look at the needs of education from a variety of angles and show how you can contribute to its success.

It's not all uphill. Recent surveys show that 98 per cent of the public considers schools critical to the future of the United States, and 70 per cent of the populace rates schools as "C" or better. We can build on that support.

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TEACHER'S VOICE, VOL. 59, NO. 11, FEBRUARY 22, 1982

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[2] [photo omitted in printing] **Riegle's view**

Sen. Donald Riegle, teacher-endorsed candidate for re-election, declares his expectation for a turn-around from wasteful defense spending to renewed support for such important needs as public education. He was speaking to participants at MEA's legislative-political action conference.

[photo omitted in printing] **Millage**

Strategy for successfully passing millages gets close attention at MEA's legislative-political action conference, as the

photograph above indicates. This session was based on MEA's involvement and experience in the successful passage of Pontiac's millage against heavy odds.

(Teacher's Voice Photos)

Legisl., political action conf. attracts many

FLINT

Teachers and their political activity are paid attention to these days.

That was evident at MEA's recent legislative-political action conference. It attracted the attention of a number of elected office-holders as well as candidates for political office. The candidates included several who aspire to be the next governor of Michigan.

More than 350 participants—MEA leaders and teachers—attended the conference at the new Hyatt Regency hotel in downtown Flint.

The conference was planned by the MEA's Government Affairs Department. It combined the legislative conference and the political action workshop, which in past years have been separate events.

This conference, at which NEA President Willard McGuire was the banquet speaker, was designed to poise MEA teacher-leaders for the critical 1982 election.

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TEACHER'S VOICE, VOL. 59, NO. 12, MARCH 8, 1982

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[5] Yeshiva-type decision favors higher ed faculty

DENVER

The first Yeshiva-related decision is in and it favors bargaining rights for the faculty members of private institutions.

The decision, by a National Labor Relations Board (NLRB) administrative law judge, involved an NEA-affiliated bargaining unit at Loretto Heights College in Colorado.

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Two similar cases involving MEA-NEA affiliated faculty bargaining units are pending—at Adrian College and at Kendall School of Design in Grand Rapids.

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[9] Women's hall of fame fundraiser set

EAST LANSING

MEA will help sponsor a fundraiser for the Michigan Women's Hall of Fame March 12 as part of the National Women's History Week, March 7-13.

A resolution introduced by U.S. Rep. Barbara Mikullski (D-Md), passed by Congress and signed by President Ronald Reagan, proclaims the special week for women and salutes "the role of American women in history (that) has been consistently overlooked and undervalued in the body of American history."

The MEA fundraiser will be held at the Lansing Civic Center and features Maggie Kuhn of the Grey Panthers as a dinner speaker. For more information contact Gay A. Weed,

Office of Women's Concerns, MEA, Box 673, East Lansing 48823.

Educational materials, including curriculum information and posters, are available from the National Women's History Week Project, Box 3716, Santa Rosa, CA 95402.

Other materials to supplement curriculum may be obtained from the Michigan Department of Education, Office of Sex Equity, Box 30008, Lansing, MI 48909. An example is an elementary school manual with 180 vignettes of women and examples of classroom activities. It's called "They Chose Greatness: Women Who Shaped America and the World."

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TEACHER'S VOICE, VOL. 59, NO. 14, APRIL 5, 1982

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[3] **Deep ed cuts face balky Congress**

WASHINGTON

Congressional feedback indicates deep trouble for President Reagan's proposed budget.

"The mood is prevalent in Washington that for the first time since Ronald Reagan became President, there is some hope that continual cuts in education will be resisted by both parties," said MEA President Keith Geiger, one of several MEA leaders who visited the Michigan congressional delegation March 23-24 in the nation's capitol.

The Michigan group was one of 50 NEA state-affiliate delegations that converged on Capitol Hill to protest the proposed federal cuts in education. About 200 teachers, including many state association presidents, visited Senate and House members and the powerful House Budget and Rules Committee.

"I think the vast majority of legislators are not going to buy Reagan's cuts in education. I heard that loud and clear," Geiger said. The MEA leader added that recent polls reported in a Washington newspaper show the American public against the Reagan cuts by a 3-1 margin and by a 2-1 margin do not feel the Democrats are providing any alternatives.

"That shows a really frustrated public our there," Geiger said, "and the members of Congress know it."

An NEA survey estimates that the state of Michigan would lose $76.4 million in aid for crucial federal elementary and secondary education programs over a two-year period if President Reagan's proposed cuts for the 1982-83 school year are approved by Congress.

3 major programs

Three major education programs, including the highly successful compensatory education program for disadvantaged children (Title 1), would be cut dramatically from $122.2 million in the 1981-82 school year to $80.4 million in the 1983-84 school year, a cutback of $41.8 million.

Aid to handicapped children would be slashed by $11.1 million from $41.2 million to $30.2 million over the same period. Vocational and adult education programs would lose $10.7 million, a drop from $30.7 million to $19 million. (These programs are funded a year in advance and the impact of the cuts is not felt until the following year.)

Two other vital federal education programs—impact aid and rehabilitation services—face serious cuts. Impact aid, a general aid program that reinforces school districts with a high concentration of military and civilian federal employees, would decline from $6.1 million in the 1980-81 school year to $2.7 million in 1982-83,

a loss of $3.3 million. Rehabilitation services for the handicapped would be cut back by $9.6 million from $29.5 million to $20.3 million over the same period. (The full impact of the cuts in these programs begins immediately after the new fiscal year on Oct. 1.)

The NEA survey also reveals that other major education programs, including aid to college students, would suffer critical cuts totaling several billions of dollars.

NEA alternative

For example, financial aid for college students and other higher education assistance, would plummet from $6.7 billion in 1981-82 to $4.5 billion in 1983-84 a drop of $2.2 billion. The Reagan budget proposals would cut off aid to some two million college students while thousands of others would receive reduced amounts. Michigan would lose $60.9 million in student aid cuts.

Bilingual education, which was funded at $179.7 million in the 1981-82 school year, would decline to $94.5 million in 1983-84, a loss of $85.2 million.

Meanwhile, cuts in child nutrition in the current school year resulted in some three million children dropping out of the program because schools were forced to raise the price of school meals. The proposed cuts next fall would eliminate 2.3 million needy children in the summer food program and 900,000 in the school breakfast program.

What are the alternatives to the administration's budget cuts? NEA President Willard McGuire has proposed an alternate proposal aimed at reducing the budget deficit and restoring the budget cuts in education.

McGuire has called for a $44 billion savings by slowing the increase in defense spending, eliminating loopholes in corporation tax credits, reducing the individual income tax July 1 from 10 to 5 per cent, and deferring the 10 per cent income tax next year.

Five billion dollars of the savings could be plowed back into education, leaving $39 billion to reduce the deficit.

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TEACHER'S VOICE, VOL. 59, NO. 15, APRIL 19, 1982

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[1] Coming up: Representative Assembly

FLINT

The spring Representative Assembly (RA), the annual business meeting of the Association, will start at 11 a.m. Thursday, April 29, at the Flint Hyatt Regency hotel.

The RA is scheduled to end on Saturday afternoon, May 1, with the completion of business that will affect the MEA's operation for the coming two years. The May 17 *Teacher's Voice* will carry a full report on decisions at the RA.

The elected delegates representing the MEA membership will consider a two-year budget (see separate article) to fund MEA programs and services, vote on proposed constitutional and bylaw amendments (see separate listing), take up new business items (see separate listing), and elect two Michigan NEA directors. Two terms on the NEA Board are expiring. This issue of *Teacher's Voice* contains statements by and information on the candidates who are running.

The Friday evening RA session will be a joint session with the Michigan Educational Support Personnel Association (MESPA) in connection with election of Michigan NEA directors. MESPA is affiliated with NEA and as such is qualified to vote in the election of Michigan NEA directors.

As a proposed budget document and new business items indicate, delegates will be facing hard decisions as the MEA moves into an apparent time of reductions and cutbacks while needs and demands for MEA services remain high.

See pages 7 and 8 for information on the MEA Representative Assembly. An article on the MESPA Representative Assembly appears on Page 7.

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TEACHER'S VOICE, VOL. 59, NO. 17, MAY 17, 1982

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[1] MEA delegates trim dues increase, staff

FLINT

A two-year budget that will significantly cut MEA staff won approval at the spring MEA Representative Assembly meeting at the Flint Hyatt Regency.

Approved by delegates at the three-day event starting April 29 was a dues increase of $2.73 per member per month. It will set the monthly dues starting in September at $23.85 per month for [insert omitted in printing] the 10-month school-year period and remain the same through June of 1984. Of the yearly dues, $6.50 per member is reserved for the bulding, site, and maintenance fund.

Delegates went beyond the budget cuts recommended by the MEA Board of Directors when they approved a proposal that will reduce the number of Uniserv zone directors from five to three positions. The MEA Board proposal contained built-in staff and program reductions reflecting a membership loss of up to 10,000 since 1980, mostly due to teacher layoffs.

As passed by the RA, the budget will mean the elimination of four management, nine professional, and 12 support staff positions. Other cuts include elimination of funding for several task forces, staff training, ballot issues, and the Council of State Organizations (COSO). Several other proposals calling for further staff reductions were rejected.

Restored in the budget by delegates was $2,500 earmarked for Migrant Education Task Force expenses.

The RA defeated a proposal that would have eliminated the fall Representative Assembly, a MEA Board recommendation, but failed to provide the necessary funding for the one-day event. The approved budget also calls for reductions in several projects, activities, travel, contingency fund, and appropriated reserves.

Decision on TAP

In other action, the RA passed a business item that will mean no earmarking of additional monies for the Teacher Assistance Program (TAP) during the 1982-83 school year. Another item authorizes the RA to assess members if the TAP fund is depleted or in danger of being depleted.

For districts that are forced to close due to a financial crisis, MEA members will be eligible for a special basic MESSA health and medical insurance policy that may be paid up to three months upon application and approval. Funds for the special insurance will come out of the TAP fund and will not apply to job action situations.

In the higher education area, MEA will conduct a two-year percentage dues pilot project. It will allow three Michigan Association of Higher Education (MAHE) units pay a minimum of $30 for MEA-NEA dues plus 2 per cent of their annual salary up to the total maximum that would be paid with a full active MEA-NEA membership.

Delegates also passed a new business item that suggested voluntary contributions total $10 for MEA-PAC and $5 for NEA-PAC for 1983-84; an item that MEA visibly support the June 12 rally at the United Nations during the special session on disarmament; and an item that MEA support the nuclear weapons freeze ballot proposal being circulated in Michigan.

Other business

Other business items passed:

—MEA *ad hoc* committees and task forces shall function no longer than one year unless continuation is approved by the RA.

—MEA shall maintain the current level of field staff, utilizing the 1 to 900 ratio as well as sparsity and geographical factors.

—MEA shall adopt a philosophical position of professional development which recognizes that adults learn better on their own initiative.

—The Resolutions Committee shall bring to the next RA a resolution encouraging the teaching of multiple means of communication for the deaf and hard of hearing, such as American sign language, lip reading, and finger spelling.

—Recommendations of the MEA Supply-Demand Task Force are adopted. (See separate article.)

—All speakers or presenters at MEA functions, conferences, or workshops shall be informed of the MEA's official position opposing racism and sexism. Evaluation forms shall include questions about the effectiveness of the presenter in dealing with aspects of race and sex equity.

—MEA goes on record in strongly opposing the past and present practices of the Department of Mental Health and the state of Michigan in regard to the "Lapeer 105," which refers to

105 female direct-care employees of the Oakdale facility of the state mental health department "illegally laid off out of the line of seniority and solely due to their gender."

180-day year

—MEA shall oppose any reduction in the state's 180-day school year requirement through lobbying and other means.

—MEA shall oppose any intervention by the state Legislature in the collective bargaining process.

—MEA will vigorously implement the retirement improvement mandate of the 1981 spring RA by: 1) actively lobbying the Legislature for adequate funding; 2) encouraging organization of local retirement committees; 3) developing and disseminating pertinent information to these

***Continued on Page 14**

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[14]*MEA delegates act on many business items

Continued from Page 1

committees; and 4) encouraging the committees to actively lobby in their areas for retirement legislation.

—MEA shall send an official delegation to represent MEA and participate in the march from Montgomery, Ala., to Washington, D.C., in support of extension of the Voting Rights Act.

—MEA president shall send a letter to the official MEA family urging local EA officers to act before June 1, 1982, to assure local teacher participation in decision-making related to expending federal block grant funds.

—MEA supports the purchase of American-built cars and trucks.

Defeated business items:

—Would have eliminated funding of released time for the MEA vice president.

—Would have eliminated headquarters staff position—one associate executive director, two directors, and one administrative assistant.

Dues Structure

—Would have required MEA to explore a dues structure based on the median salary by zone.

—Would have prohibited any further loss of professional staff positions during the 1982-84 budget year.

—Would have required during the 1982-84 budget that the state-wide ratio of MEA managers and administrators to professional staff be adjusted to a level of no less than one manager per nine professional staff members.

—Would have required MEA to support the boycott of "Labels for Education" promoted by Campbell's soups.

—Would have made budget adjustments by reducing staff, consolidating zone offices, and reducing the appropriated reserve adjustment.

—Would have provided that RA delegates be paid the actual cost of fuel used on the mileage reimbursement.

—Would have required the spring RA to adjourn by noon on Saturday.

—Would disallow mileage or meal expenses to RA delegates living within a 20-mile radius of the assembly site.

—Would have given RA endorsement to the Campbell's/Libby's boycott which is being promoted by striking tomato workers.

—Would have disallowed any MEA-PAC monies or volunteer help to any incumbent legislator who voted against the state income tax increase.

—Would have required a ballot to be sent to every MEA member to determine if MESPA members should be given full MEA membership.

Special education

—Would have restored funding for special education and bilingual task forces and the Council of State Organizations.

—Would have required the MEA to establish a blue ribbon committee to develop goals to direct the state's educational, financial, and political future.

—Would have established a process for a reorganized coordinating council to declare its service unit status when local and state option associations are combined.

—Would have reduced the number of managers by nine positions during the next two years.

—Would have frozen all line items pertaining to cost of staff and management at the 1982-83 level for the 1983-84 budget.

—Would have clarified the process by which a local option coordinating council may petition the MEA Board to become a state option unit.

—Would have required the MEA office of negotiations to be staffed at current level.

—Would have required the MEA office of negotiations to be staffed at current level.

—Would have stipulated that if staff reductions occur during the 1982-84 budget years, the professional staff reductions shall be implemented based on an actual MEA/MESPA membership loss as shown in the official membership count.

Withdrawals:

—Would have required a two-year moratorium on further cuts in MEA/MESPA Uniserv support field staff.

—Would have required subsidies for coordinating councils and region councils to be continued at the 1981-82 level.

—Would have required RA delegates from the most distant regions to be assigned housing nearest the assembly site.

—Would have eliminated headquarter positions of one director/manager, two professional staff, and one administrative assistant.

—Would have prohibited any coordinating council from containing more than 15 bargaining units per Uniserv staff person.

—Would have put a freeze on all MEA salaries, fringe benefits, and expense allowances from 1983-84.

Referrals:

—MEA seek a revision in the Michigan special education rules adopted August, 1980 by the State Board of Education. *To the Instruction and Professional Development Commission.*

—A review of House Bill 5355 which provides that a child be five years of age by Sept. 1 to begin school. *To the Legislation Commission.*

* * * *

[2] NEA-PAC giveaway winners

FLINT

Bonnie Yates of Jackson, a Grass Lake teacher, was the big winner in MEA's 1982 NEA-PAC giveaway. Yates won the first prize, a one-week trip for two to Hawaii, in the drawing held at the MEA Representative Assembly in Flint.

Other winners included: Linda Spencer of Deckerville, 2nd prize, a video tape recorder; John Hampson of Flat Rock, 3rd prize, a personal computer; and Fred Burnett of Three Rivers, 4th prize, a weekend for two at the Detroit Renaissance Center.

NEA-PAC contributions are used to help elect friends of education to federal office.

The Jackson County Education Association (JCEA/MEA-NEA) led all coordinating councils with contributions totalling $2,455. The NEA-PAC giveaway netted in excess of $24,000.

***TEACHER'S VOICE*, VOL. 59, NO. 18, JUNE 14, 1982**

* * * *

[4] Check out these new NEA resolutions

LOS ANGELES

NEA's resolutions are adopted at its annual Representative Assembly, which this year will be July 1-6 in Los Angeles. Resolutions represent NEA's statement of philosophy and set the pace and form not only for NEA's program but also for its budget for the coming year.

Therefore, individual member participation in establishing these resolutions is important. An opportunity is provided—

through representation on the NEA Resolutions Committee that equals the number of NEA Board of Directors members from each state.

Michigan's representatives on the committee: Karen Bunting (Garden City district), Lois Fisher (Kalamazoo), Gary Hansen (Grand Rapids), Marion McCracken (Farmington), and Jack Minore (Flint).

If you have concerns about the resolutions or proposed changes or additions, contact any Michigan members of this committee. The committee will meet again just prior to the RA July 1.

The *NEA Reporter* listed NEA current resolutions in its September, 1981 issue. Following are brief descriptions of proposed new resolutions and changes:

A-22. Nuclear evacuation plans. Involve teachers and other school personnel in nuclear evacuation plans and keep them informed. (New resolution)

A-24. Jobs with peace. Halt cuts in federal funds for education, human, and social programs, taking funds from over-inflated military budget. (New resolution)

B-56. Video game management. Ban commercial use of video games in public schools and regulate operation of such games in commercial establishments. (New resolution)

C-3. Class size. Use declining enrollment to reduce class size to an optimum level of 15 pupils and use weighted formula for inclusion of exceptional students in classes. (New resolution)

C-7. Teacher centers. Support federal and state funding of teacher centers that are accessible to all teachers in the nation. (New resolution)

D-2. Reconsideration of in-

*Continued on Page 5

* * * *

[5]*Input needed on NEA resolutions

Continued from Page 4

structional materials and teaching techniques. NEA affiliates obtain adoption of orderly policies and procedures free of censorship for reconsideration of instructional materials and teaching techniques. (New resolution)

H-10. Ocean resources. Support United Nations effort to negotiate treaty regulating exploration, development, and use of ocean resources. (New resolution)

H-22. Internment/containment policies. Oppose internment of immigrants except for "clear and present" danger to society. (New resolution)

A-1. Educational opportunity for all. Oppose tax exempt status for institutions blocking their own integration. (Revision)

A-2. Public education. NEA members encouraged to send their own children to public school. Recognize the cultural, social, political, and religious differences found throughout the world. (Revision)

A-21. Radiation and chemical pollution. Give attention to transporting and disposing of chemical wastes. (Revision)

B-10. Health of children. Strengthen provisions and enforcement of child abuse laws and outlaw pornographic exploitation of children. (Revision)

B-17. Career education.

B-19. Alternative programs for students with special needs.

B-24. Child abuse. Encourage student awareness of child abuse and encourage affiliates to develop educator awareness programs in child abuse. (Revision)

E-7. Basic/fringe benefits. Add the following: unemployment compensation, optical, dental, and legal insurance. (Revision)

E-38. Medication in schools. Sets standards for use of medications. (Revision)

G-1. The educator as a citizen. NEA members urged to support their political action committees (PAC's). (Revision)

* * * *

TEACHER'S VOICE, VOL. 59, NO. 19, JULY 19, 1982

* * * *

[3] **NEA delegates take aim at tuition tax credits**

LOS ANGELES

The NEA's annual meeting in Los Angeles was pro-public education, pro-peace, and pro-equality for all people.

These positions come at a time of assaults in all three areas.

The assaults on public education have come in the form of Reagan-supported budget cuts for public education and a Reagan proposal for tuition tax credits to benefit the families of pupils attending private and parochial schools.

In a joint statement with the American Federation of Teachers (AFT), NEA delegates affirmed that both NEA and the AFT "will continue to make opposition to tuition tax credits a key issue in our decisions about political endorsements."

The statement said that "the attempts to enact tuition tax credit schemes constitute an effort to undermine the financial support structure of the public schools of our nation.

"Such proposals are bad economic policy, improper public policy, harmful educational policy, and violate the spirit and the letter of the United State constitution."

NEA is part of a National Coalition for Public Education drive for more than a million signatures opposing the Reagan administration's proposal for tuition tax credits. NEA has already collected more than 100,000 signatures, many of them from Michigan.

Delegates put NEA in support of a worldwide grassroots movement seeking a freeze on nuclear weapons, making this item a top NEA legislative priority. Delegates also called for more emphasis on peace initiatives.

In the aftermath of the failure of the Equal Rights Amendment (ERA), delegates affirmed NEA's support for a new ERA expected to be introduced soon in Congress.

Women's campaign

Meanwhile, NEA is into a "womens rights vote" campaign that emphasizes voter registration and get-out-the-vote efforts in this year's congressional elections.

President Reagan declined an invitation to address the convention. However, he

***Continued on Page 8**

• • • •

[8]*NEA blasts tax credits

Continued from Page 3

was vacationing in the Los Angeles area and thousands of NEA delegates turned out for a parade protesting his policies.

Under Reagan's leadership, charged NEA President Willard McGuire, there has been "an unprecedented assault on public education." NEA Executive Director Terry Herndor declared it an "absolute imperative" to elect a Congress supportive of education in 1982 and a new administration in 1984.

Arthur Flemming, a prominent Republican and former chair of the U.S. Commission on Civil rights, received NEA's Friend of Education award. Flemming was forced out of office agter the Reagan administration came to power.

Flemming said Reagan's "new federalism" is an instrument to undermine desegregation and cut back on funds for the education of the handicapped.

Mary Hatwood Futrell was unopposed for reelection as NEA secretary-treasurer and was elected by acclamation. Edmond Foglia, past president of the California Teachers Association, and Jim Lewis, past president of Kansas-NEA, were elected to three-year terms on the NEA executive committee.

• • • •

[3] [Printed out of order for convenience in reading]

PAC Giveaway nets $100,000!

LOS ANGELES

The NEA-PAC giveaway at the NEA convention in Los Angeles netted nearly $100,000, with the Michigan delegation contributing the largest amount of any state.

The total—'94,854—will be used to help elect friends of education to federal office in this year's national elections.

The giveaway idea was conceived last year by the Michigan delegation as a way of promoting the "buy American car" concept and raising funds for federal office candidates. Last year, the giveaway raised $53,000, the largest amount ever raised in a single NEA-PAC fundraiser.

This year's goal of $15 for each state delegate was met or exceeded by 32 states. Last year's quota was $10 per delegate in each state.

The American-made car, contributed by the California delegation, was won by an Ohio teacher. The Michigan delegation ran the giveaway program.

• • • •

EXCERPT FROM
PLAINTIFFS' TRIAL EXHIBIT 627
ORGANIZING & BARGAINING DEPARTMENT
WEEKLY REPORTS, MEMORANDUM
FROM ART RICE TO BOB MARSHALL
ATTACHED TO WEEKLY REPORT DATED
OCTOBER 23, 1981
[Offered & admitted Jan. 16, 1986]

* * * *

[MEA logo omitted in printing]

PROGRAM SERVICES DIVISION
ORGANIZING AND BARGAINING DEPARTMENT

MEMO

To: Bob Marshall

From: Art Rice /s/

Date: October 23, 1981

Re: Weekly Update

During the past week the following activities are of significance in higher education.

* * * *

4) Ferris State College. Ferris still does not have a contract. Because a large number of staff did not vote, they did not get a majority of the "total staff" voting "yes" for a job action. Of those who voted, a sizable majority voted "yes." Their local bylaws require a majority of the total staff to take a job action. Fringe benefits are still at issue (especially the insurance coverage and carrier).

* * * *

EXCERPTS FROM
DEFENDANT UNIONS' TRIAL EXHIBIT I
1981-84 AGREEMENT BETWEEN
THE BOARD OF CONTROL OF
FERRIS STATE COLLEGE &
THE FERRIS FACULTY ASSOCIATION
MEA-NEA
[Offered & admitted Jan. 7, 1986]

Section 1 - BASIC CONTRACTUAL PROVISIONS

1.1 Agreement and Definitions

This Agreement entered into this 19th day of November, 1981, is between the Board of Control of Ferris State College (hereinafter referred to as "Ferris," or the "College" or the "Employer") and the Ferris Faculty Association, an affiliate of the Michigan Association for Higher Education MEA-NEA (hereinafter referred to as the "Association").

1.2 Purpose

The general purpose of this Agreement is to set forth agreements reached between Ferris and the Association with respect to wages, hours, and other terms and conditions of employment for the employees in the bargaining unit described in the Recognition clause below.

*1.3 Recognition

In conformity with its responsibility under the laws of the State of Michigan with respect to the collective bargaining rights

---

*[Footnote omitted in printing]

of the faculty, Ferris does hereby recognize for the term of this Agreement, the Association as the collective bargaining agent for the persons included in the bargaining unit as herein defined:

> All full-time Board-appointed Ferris State College teaching faculty (10 or 12 month); librarians; audiovisual consultants; educational counselors; admissions counselors; coordinator of testing; financial aid assistant; director of student activities; rehabilitation counselor; foreign student counselor; veterans counselor; counselor for off-campus housing; assistant placement director; assistant to registrar; and Board-appointed part-time faculty who have been employed for at least one-half of the average load for their department for each of the last three consecutive quarters; excluding deans; associate and assistant deans; administrative assistants or assistants to deans; department heads; head librarian; administrative affairs division personnel; business operations division personnel; registrar; director of admissions, records and registration; associate director of admissions; director of financial aid; director of placement; director of security: director of student development services; college relations and development division personnel; all health center personnel; head residents, and all other college personnel and supervisors. [Rest of § 1.3 omitted in printing]

* * * *

EXCERPTS FROM
DEFENDANT UNIONS' TRIAL EXHIBIT GGGG
NEA PROGRAM ACCOMPLISHMENT REPORT
FISCAL YEAR 1981-82
[Offered & omitted Jan. 10, 1986]

FOREWARD

The Program Accomplishment Report for Fiscal Year 1981-82 is presented to Governance as a part of the budget process. The intent of the Report is to provide information to the various governance bodies on the accomplishment of the prior year's program.

The Report is arranged by administrative Areas and describes the functions and programs within the Area.

The five columns of the Report are as follows:

Column 1 - The Area, Functions, and Programs are listed as approved by the Board of Directors.

Column 2 - The Program Accomplishment statement is a statement of what the program was intended to achieve. The statement describes either an attainment of some specific result or describes a condition of being at a point in time.

Column 3 - This column states the degree to which the Association was successful in achieving the intended product or describes the activities undertaken during the year to achieve the product.

Column 4 - The amount of dollars originally budgeted by the Representative Assembly and adjusted by any governance action during the year.

Column 5 - The amount of funds actually expended during the fiscal year.

[Column format altered & columns 4 & 5 omitted in printing]

* * * *

Area: Affiliate Services

* * * *

5.0 [Function] Bargaining and Negotiation Support

5.1 [Program] Assist eight state affiliates to enhance state negotiation support programs.

Program Accomplishment[:] Projects developed with eight state affiliates and assistance provided to enhance negotiations support programs.

Summary[:] Bargaining projects were designed, conducted, and funded in nine states: Alabama, Alaska, Colorado, Nevada, North Dakota, South Dakota, Vermont, West Virginia, and Wyoming.

5.2 [Program] Assist affiliates in securing effective negotiated contracts through training programs, conferences, and analytical papers; assist affiliates in improving teacher benefit programs.

Program Accomplishment[:] Bargaining behavior training developed, reviewed, and revised; two sessions in implementation of bargaining behavior training held; one state coordinators conference held; four issues of the Bargaining Quarterly published; model fringe benefit bargaining contract clauses reviewed and revised as needed.

Summary[:] The bargaining behavior training program was reviewed and two training of trainers sessions were held. One State Bargaining Coordinators Conference was held. Two regional national bargaining conferences were held. Three Bargaining Quarterly issues were developed with NEA Research, and fringe benefit bargaining language was reviewed.

5.3 [Program] Review and revise existing grievance and arbitration programs, conduct training and analyze trends and developments in contract enforcement.

Program Accomplishment[:] Grievance training, Arbitration B, and Advanced Arbitration programs reviewed and revised as needed. Two training sessions for trainers in Advanced Arbitration and one Arbitration B training session conducted; one article on contract enforcement prepared for each issue of the Bargaining Quarterly.

Summary[:] Grievance training, Arbitration B, and Advanced Arbitration training programs were reviewed. Three Advanced Arbitration training sessions were conducted. One Grievance Training session was held. Three Arbitration B sessions were held. Articles were

prepared for Bargaining Quarterly on such topics as RIFs, mass experience, and flexible cafeteria plans.

* * * *

Area: Research

* * * *

2.0 [Function] Collective Bargaining/Benefits Services

2.1 [Program] Produce and distribute Collective Bargaining Quarterly.

Program Accomplishment[:] Four issues of Collective Bargaining Quarterly produced and distributed.

Summary[:] Four issues of Collective Bargaining Quarterly were produced and distributed: association rights, summary of state bargaining and labor statutes, significant judicial and state labor board decisions, bargaining/research conference report, and fringe benefits issues. A Collective Bargaining Quarterly editorial board was established with Affiliate Services, Communications, and Research staff participation. A new cover format and editorial policy were developed.

2.2 [Program] Produce and distribute basic benefits memos.

Program Accomplishment[:] Four basic benefits memos produced and distributed.

Summary[:] An issue of the Collective Bargaining Quarterly (June 1982) was devoted to fringe benefits issues, retirement, group insurance, and health insurance.

2.3 [Program] Produce and distribute higher education memos.

Program Accomplishment[:] Five higher education memos on current issues and practices produced and distributed.

Summary[:] Two memos were published: Salary Schedules for Faculty in Higher Education, 1980-81, and National and State Statistics of Faculty Salaries Paid in Higher Education, 1980-81. State/local surveys were developed to inventory state research organization, staffing, and resources, and assess state needs and ability to provide services from the perspective of executive director, director of Affiliate Services, Research director, and selected UniServ directors.

2.4 [Program] Produce and distribute school support personnel memos.

Program Accomplishment[:] Two school support personnel memos produced and distributed.

Summary[:] Memos, information, and data for support personnel were incorporated into the Collective Bargaining Quarterly.

2.5 [Program] Produce and distribute memos on issues affecting retirement; analyze, evaluate, and report on retirement systems; conduct retirement forum.

Program Accomplishment[:] Six memos on retirement produced and distributed; retirement systems analyzed, evaluated, and reported; retirement forum conducted.

Summary[:] A new publication entitled "Pension Alert" was established to keep state retirement contacts informed about public retirement issues. Three of these publications were produced and distributed and included issues such as the Public Employee Pension Plan Reporting and Accountability Act of 1982 legislative activity, retirement benefits, investment of pension funds in real estate, and social security termination.

Two retirement memos were published: General Revenue Financing of Social Security, and The Private Pension System and Its Role in Providing Economic Security.

A summary report of state retirement systems was published and distributed. The Retirement Forum was postponed because of low registration and lack of funds.

Research assistance on retirement issues was provided to eight states on unisex tables, real estate and mortgage investments, social security termination, and general public employee retirement information. Position papers on testimony were prepared for Government Relations on Mobile Teacher Retirement and the Public Employee Retirement Income Security Act.

2.6 [Program] Provide technical assistance and staff support for the Teacher Benefits Committee.

Program Accomplishment[:] Four Teacher Benefits Committee meetings held and report for the Representative Assembly prepared and delivered.

Summary[:] Three Teacher Benefit Committee meetings were held, and a final report was prepared and delivered for the Representative Assembly.

* * * *

5.0 [Function] Studies/Special Projects

5.1 [Program] Produce and distribute scheduled and ad hoc reports on federal and state aid to education.

Program Accomplishment[:] Financial Status of Public Schools, Estimates of School Statistics, Rankings of the States, national finance study on federal aid to education, and technical papers on federal and state educational finance as requested produced and distributed.

Summary[:] Estimates of School Statistics and Rankings of the States were published.
Two issues of Prices, Budgets, Salaries, and Income were produced.
Summary of Economic, Political, and Social-Psychological Factors Affecting School Finance was produced and disseminated.
Can the States Pick Up the Slack? A state-by-state profile of tax structures, expenditures, and status of surpluses, was produced and disseminated.
Block Grants. An analysis of regulations and their impact on policy, programs, and practices in the 50 states was produced in cooperation with Government Relations.
Two analyses of the federal budget, displaying state-by-state projections of impact, were produced and disseminated.
Workshops were conducted with state presidents and IPD field staff on state school

finance issues/implications and block grants, and an information/resource package was developed. Analysis of school finance/block grant implications for all NEA programs was produced and disseminated to NEA executive staff.

5.2 [Program] Conduct finance studies on state revenue and expenditures for affiliates.

Program Accomplishment[:] Four finance studies conducted and reported to state affiliates.

Summary[:] Idaho school finance and taxation study was completed.
Vermont school finance profile was completed and used for training UniServ staff.
Delaware finance study/poll was initiated.
Customized budget analyses were produced for Maryland, New Hampshire, and Maine.
Customized profile of school finance in Oregon was compiled for the OEA Vice-President.
Customized profile of school finance in Arizona was compiled for the AEA Vice-President.

* * * *

Area: Administration

1.0 [Function] Administrative Services

* * * *

1.5 [Program] Coordinate all contractual and logistical arrangements for the NEA Annual Meeting.

Program Accomplishment[:] Contractual and logistical arrangements completed for the NEA

Annual Meeting and associated meetings; support services provided.

Summary[:] The program was successfully accomplished.

* * * *

Area: Governance

1.0 [Function] Representative Assembly

1.1 [Program] Provide financial support for Editing and full Resolutions Committees, based on 5-member Editing and 125-member Resolutions Committee.

Program Accomplishment[:] Meetings held in spring and during Annual Meeting to consider proposed resolutions; resolutions submitted to 1982 Representative Assembly.

Summary[:] Meetings were held as scheduled and Resolutions were adopted by the 1982 Representative Assembly.

1.2 [Program] Provide financial support for Committee on Constitution, Bylaws, and Rules, based on five members for two 2-day meetings in Washington, a 1-day meeting prior to the Representative Assembly, and expenses during the Representative Assembly; also includes costs related to special hearings, as needed.

Program Accomplishment[:] Meetings held as necessary to consider proposed amendments to governing documents; amendments submitted to 1982 Representative Assembly for action.

Summary[:] Meetings were held as scheduled and amendments were adopted by the 1982 Representative Assembly. No special hearings were necessary.

1.3 [Program] Provide financial support for Credentials Committee, based on five members for two 2-day meetings in Washington, a 2-day meeting prior to the Representative Assembly, and expenses during the Representative Assembly.

Program Accomplishment[:] Accreditation and registration of delegates to the 1982 Representative Assembly supervised and reported.

Summary[:] Meetings were held as scheduled and a report was provided to the 1982 Representative Assembly.

1.4 [Program] Provide financial support for Elections Committee, based on expenses for chairperson and meal service for full committee during elections; also includes computer costs incurred in tabulating election results.

Program Accomplishment[:] Elections held and completed at the 1982 Representative Assembly.

Summary[:] Elections were held as scheduled at the 1982 Representative Assembly.

1.5 [Program] Provide financial support for Committee on Program and Budget, based on eight members for three regular meetings in Washington and subcommittees participating in regional and other meetings.

Program Accomplishment[:] Budget for 1982-83 designed to achieve the goals and objectives of the Association.

Summary[:] Meetings were held as scheduled and subcommittees conducted hearings at regional and other meetings.

1.6 [Program] Provide reports and documents of the Representative Assembly: Financial Report, Treasurer's Report, Proposed Program Budget, Report on Implementation of Resolutions and New Business, Reports of Committees, Report on Resolutions, and Proposed Amendments to the governing documents.

Program Accomplishment[:] Reports and other documents produced and distributed.

Summary[:] Reports were produced and distributed on projected timeline.

1.7 [Program] Provide financial support for invited visitors at the Annual Meeting, including international guests and non-Association guests invited to make presentations to the Representative Assembly.

Program Accomplishment[:] Attendance at the 1982 Representative Assembly.

Summary[:] Support was provided for six international guests and two speakers attending the 1982 Representative Assembly.

1.8 [Program] Plan and execute arrangements for the Annual Meeting; includes costs for rental of facilities, hall decorations, labor, TV and sound systems, busing, stenographic and parliamentarian

services, preconvention minority conference, preconvention women's conference, and Friendship Night.

Program Accomplishment[:] 1982 Representative Assembly completed.

Summary[:] The 1982 Annual Meeting was held as scheduled.

1.9 [Program] Provide support for ATA-NEA Past-Presidents to attend Annual Meeting, based on 15 persons; also includes costs for special dinner/social during the Annual Meeting.

Program Accomplishment[:] Attendance at 1982 Annual Meeting supported.

Summary[:] Support was provided for 17 past presidents attending the 1982 Annual Meeting and a social was held as scheduled.

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

A. The Background Facts

Petitioners are faculty members at Ferris State College, a public institution of higher education in Michigan. Since at least 1975, the Ferris Faculty Association-MEA-NEA ("FFA") has been recognized under the Michigan Public Employment Relations Act as the bargaining representative for a unit consisting of faculty and other professional employees at Ferris State College. FFA is a local affiliate of the Michigan Education Association ("MEA") at the state level and the National Education Association ("NEA") at the national level. Through a network of local affiliates such as FFA, both MEA and NEA represent and provide services to employees of public schools, colleges, and universities throughout Michigan (in the case of MEA) and the nation (in the case of NEA). PA 19a, 32a, 39a.[1] As required by its affiliation relationship with MEA and NEA, FFA has a "unified membership" structure—*i.e.*, if an employee chooses to become a member of FFA, he or she also must become a member of, and pay dues to, MEA and NEA. PA 2a, 19a.

During the 1981-82 academic year, which is the only year at issue in this case, PA 2a, petitioners were included in the bargaining unit represented by FFA, but chose not to join FFA. As permitted by Michigan law, the collective bargaining agreement that was in effect during that year contained a service-fee provision, pursuant to which all employees in the bargaining unit who refused to become members of FFA ("nonmember employees") were required to pay a service fee to FFA. The fee for nonmember employees who did not assert a timely objection was $284.00, which, as required by the collective bargaining agreement, PA 21a n.3, corresponded to the full amount of dues "uniformly required" of mem-

[1] "PA" refers to the Appendix to the Petition for Certiorari; "JA" refers to the Joint Appendix.

bers of FFA, PA 2a, 24a. Of that amount, $24.80 was disbursed to FFA, $211.20 to MEA, and $48.00 to NEA. PA 24a.[2]

B. The Proceedings Below

Petitioners objected to the amount of the FFA service fee, and filed this lawsuit contending, *inter alia*, that the unions were using their service fees to engage in certain activities for which objecting nonmember employees could not be charged under the First Amendment. After a twelve-day bench trial, the court concluded that the unions had established the chargeability of only 81% of the FFA portion of the fee, 3.4% of the MEA portion of the fee, and 2.75% of the NEA portion of the fee, PA 60a, 64a, 66a, for a total chargeable fee of $28.59, PA 75a.[3] Included in this amount were expenditures for certain activities which, in petitioners' view, may not constitutionally be charged to objecting employees. The activities in question, and the findings of the courts below with respect to them, are as follows.

1. *Activities of FFA.* The parties stipulated to the list of FFA expenditures that is set forth in Appendix A to the District Court's opinion. PA 78a-79a. Four of these expenditures are still at issue.

First, the District Court held that $1,026.84 "used to send FFA representatives" to the MEA and NEA Conventions (called "Representative Assemblies") is "fully

[2] Any nonmember employee who objected to paying the full amount of the service fee could pay a reduced fee determined through a procedure established by the unions. PA 23a. In the District Court, petitioners also challenged certain aspects of this procedure, but that challenge is no longer part of the instant case. *See* 643 F. Supp. 1306, 1311-12, 1330-34 (W.D. Mich. 1986), *modified*, 707 F. Supp. 1473, 1482, 1490 (W.D. Mich. 1988), *aff'd*, 893 F.2d 111 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 2586 (1990).

[3] The District Court acknowledged that the unions actually may have expended a significantly greater portion of their budgets for chargeable activities, but held that the unions had failed to meet the strict burden of proof that the court had imposed upon them. *See, e.g.*, PA 58a-59a, 61a-63a, 64a-66a.

chargeable" to objecting employees, PA 30a, 57a. The court based its holding on *Ellis v. Railway Clerks*, 466 U.S. 435, 448-49, 456-57 (1984), in which this Court had concluded that it does not violate the First Amendment to charge objecting feepayers for all costs associated with a national union convention. The Court of Appeals affirmed this ruling. PA 6a.

Second, applying "the same rationale," the District Court approved the chargeability of $666.42 in expenses incurred by FFA in "sending representatives to the 13E [C]oordinating [C]ouncil, where bargaining strategies and representational policies are developed for . . . the Ferris State College and Central Michigan University bargaining units." PA 30a, 58a. The Court of Appeals also agreed with this ruling. PA 6a.

Third, the District Court concluded that $149.99 spent by FFA on the Preserve Public Education ("PPE") Conference was chargeable to petitioners because the Conference was concerned with activities, including lobbying and millage elections, that "are absolutely necessary to fund public education" and therefore are "directly related to the statutory duties of the exclusive representative." PA 31a, 58a. The court credited testimony that described the PPE Conference as "really the front line bargaining of . . . contracts," because "if [the unions] have no way of raising that money, which is all allocated through the legislative process or [a millage] election, then [they] have no way to bargain." PA 31a. The Court of Appeals affirmed this ruling. PA 9a.

Fourth, based on the fact that FFA was engaged in extremely difficult negotiations with Ferris State College during 1981-82, PA 29a, the District Court held that FFA expenditures of $4,804.00—$3,821.04 for operation of a "crisis center/strike headquarters"; $832.96 "for informational picketing, media exposure, signs, posters and buttons"; and $150.00 "for rent to hold membership meetings"—were chargeable to petitioners. PA 30a.

The "crisis center," the court noted, "never became a 'strike headquarters' but still served a useful purpose in

the negotiations process." PA 59a. As for the "rent paid to hold membership meetings," the court deemed this expense "necessary to keep the employees of the bargaining unit apprised of the progress of the negotiations and to get feedback on the members' demands." PA 59a. And with regard to the disputed expenditures for public relations, the court stated that "these expenses are incurred for the purpose of informing the public of the issues involved in an attempt to bring public pressure to bear on the employer," and found that "[t]his type of public opinion and support is very important during contract negotiations involving public sector labor unions such as the FFA given the nature of the employment and the funding available to the college." PA 30a. The court credited testimony demonstrating that the actions taken by FFA were an "effectiv[e] . . . bargaining tool," and noted that "troublesome negotiations" precipitating this type of job action usually "are resolved at the bargaining table short of a strik[e]." PA 29a.[4] The Court of Appeals affirmed. PA 11a.

2. *Activities of MEA.* The District Court ruled that petitioners could be charged for the costs of two activities of MEA.

First, the court held that petitioners could be required to contribute to MEA expenditures of "$212,959 for the MEA [Convention] and . . . $118,216 for [sending representatives to] the NEA Convention," noting that "[b]oth are clearly chargeable . . . under *Ellis*." PA 62a-63a. The Court of Appeals affirmed, noting that *Ellis* had held that "the *entire* cost of the national union's convention was chargeable to employees, even though a portion of the convention was apparently 'political' in nature." PA 6a, 10a-11a (emphasis in original).

[4] The court emphasized the fact that FFA did not engage in an illegal strike, concluding that this fact was "of paramount importance," and stating that "[t]he question whether any of these expenditures may have been chargeable had a strike occurred is one that this court need not address." PA 59a.

Second, the District Court allowed the unions to charge petitioners for the costs of producing portions of the *Teacher's Voice*, "the primary publication of the MEA reporting on all activities of the organization" that was "distributed to all members of affiliated bargaining units." PA 33a. Noting that, under *Ellis*, the total of $254,092 expended on this publication "is chargeable to the same extent that the publication reports on activity that is chargeable," the court "reviewed . . . exhaustively" all issues of the *Teacher's Voice*, and "made an independent determination of the chargeable content" of those issues. PA 63a. The court's analysis "reveal[ed] that 81.6%" of the amount MEA expended on the *Teacher's Voice* was chargeable to petitioners, PA 63a, including all column inches categorized as "Collective Bargaining" and "Public Relations," and varying portions of the column inches categorized as "Lobbying," "Electoral Politics," and "Litigation." *See* PA 80a.[5] Again, the Court of Appeals affirmed this ruling. PA 9a-10a & n.1.

3. *Activities of NEA.* With regard to NEA, the District Court concluded that certain NEA expenditures had been shown to be "related exclusively to union activities that are clearly chargeable," PA 65a-66a, including $785,190 expended by the Affiliate Services area on

[5] In order to facilitate its review of all issues of the *Teacher's Voice*, the District Court relied on a "content analysis" of those publications, prepared by petitioners during this litigation, that divided articles in the *Teacher's Voice* into ten separate categories. *See* PA 80a; JA 197-250. As petitioners acknowledge, Brief for Petitioners at 17 n.8, the District Court admitted this "content analysis" into evidence solely for purposes of its mathematical measurement of column inches and its listing of the titles of articles appearing in the *Teacher's Voice*, and not for the self-serving description or categorization of those articles that petitioners also included in the "content analysis." *See* JA 24-26. Although the unions continue to disagree with the description and categorization of articles from the *Teacher's Voice* that is reflected in the "content analysis," we follow the lead of the District Court and in this brief use the disputed categories as a point of reference.

"Bargaining and Negotiation Support," JA 294-96; $284,814 expended by the Research area on "Collective Bargaining/Benefits Services," JA 296-99; and $395,801 expended by the Research area on "Studies/Special Projects" relating directly to the financing of public education, JA 299-300. *See* PA 65a-66a. Again, this ruling was affirmed on appeal. *See* PA 10a-11a.

SUMMARY OF ARGUMENT

Petitioners' basic position is that they may be charged under the First Amendment only for their pro rata share of the cost of union activities that are "necessary" or "essential" to negotiating a collective bargaining agreement with Ferris State College, administering that agreement, and adjusting grievances under it, but this position finds no support in this Court's prior decisions. The constitutional test for chargeability, as set forth in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), refined and applied in *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), and recently reaffirmed in *Keller v. State Bar*, —— U.S. ——, 110 S. Ct. 2228 (1990), is whether the activities in question are germane to collective bargaining, contract administration, or grievance adjustment, or, more precisely, whether they are "normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative."

Focusing upon the activities of MEA and NEA, petitioners assert that, even if an activity is closely related to collective bargaining, it still is not chargeable unless it was undertaken directly on behalf of the bargaining unit to which the objecting employees belong. This argument is fatally flawed because: it ignores the judgment of the Michigan Legislature that the important state interest in labor peace is furthered by allowing a local bargaining representative to charge objecting employees for their fair share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities are not performed for the direct benefit of the objecting employees' bargaining unit; it fails to recognize the purpose of union affiliation,

especially the fact that FFA's ability to "implement or effectuate [its] duties . . . as exclusive representative" is enhanced by having constantly available to it, on an as-needed basis, services from its larger parent organizations; and it would impose upon MEA and NEA an unreasonable and unmanageable administrative burden, the effect of which would be to restrict the unions' ability to require every employee to contribute to the cost of collective bargaining activities.

All of the specific expenditures challenged by petitioners are for activities that are germane to collective bargaining, and are well within the range of constitutionally chargeable activities. Although some of the challenged activities (*e.g.*, lobbying on specific terms and conditions of employment, such as retirement, and increased funding for public education) are communicative and involve the expression of ideas, these activities nonetheless are chargeable to objecting employees because they result in little additional infringement of First Amendment rights beyond that already accepted as part of the agency shop itself, and none that is not justified by important government interests.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT PROHIBIT UNIONS FROM REQUIRING OBJECTING EMPLOYEES TO CONTRIBUTE TO THE COSTS OF ACTIVITIES THAT ARE NORMALLY OR REASONABLY EMPLOYED TO IMPLEMENT OR EFFECTUATE THE DUTIES OF AN EXCLUSIVE REPRESENTATIVE

Because this Court has indicated that "requiring" nonmember employees to support their collective-bargaining representative " 'has an impact upon their First Amendment interests,' " *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 301 (1986) (quoting *Abood v. Detroit Board of Education*, 431 U.S. 209, 222 (1977)), petitioners argue that "strict scrutiny" must be applied to every expenditure that is disputed by objecting employees. According to petitioners, objecting employees may be required to pay their proportionate share only of those

expenditures that are "necessary" or "essential" to the union's performance of its statutory functions as bargaining representative. Brief for Petitioners ("P. Br.") at 6-12. As we now show, however, this position finds no support in this Court's prior decisions.

In its early union-shop decisions arising under the Railway Labor Act ("RLA"), the Court noted that dissenting employees lawfully could be charged for activities "in the realm of collective bargaining" or "for purposes . . . germane to collective bargaining," but not "as a cover for forcing ideological conformity or other action in contravention of the First Amendment." *Railway Employees v. Hanson*, 351 U.S. 225, 235, 238 (1956). *See Machinists v. Street*, 367 U.S. 740, 764 (1961) (unions may not force employees "to support political causes which they oppose"); *Railway Clerks v. Allen*, 373 U.S. 113, 121 (1963) (suggesting "a division of the union's political expenditures from those germane to collective bargaining").

Subsequently in *Abood*, the Court first relied on *Hanson* and *Street* to hold that objecting employees in the public sector could be compelled, consistent with the First Amendment, to contribute service fees for activities that are germane to collective bargaining, contract administration, and grievance adjustment, 431 U.S. at 225-26, 232. The Court then held that such employees, if they asserted a timely objection, could prevent the union from "spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." *Id.* at 232, 234; *see id.* at 236 (prohibiting subsidization of "ideological activities unrelated to collective bargaining").[6]

[6] The first limitation in *Abood*—that service fees may not be used to contribute to political candidates—directly implements the First Amendment interest in preserving each employee's autonomy in the electoral process. Because this process is the base for our entire democratic system, "the constitutional [free speech] guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). This limitation, of course, has no direct application in the instant case, because the unions contribute to political candidates only through political action committees, which are financed entirely by voluntary contributions from members, and all costs associated with administering those committees are treated as nonchargeable. *See* PA 43a; Trial Testimony of Peter McNenly at 41-42.

The second limitation in *Abood*—that service fees may not be used to support political or ideological activities unrelated to collective bargaining—is simply a restatement of the requirement that the union's expenditure of compelled fees must be reasonably related to the legislative purpose underlying the agency shop.

Other than stating that "[t]here will . . . be difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited," *id.* at 236, the Court in *Abood* declined to address in specific terms which expenditures are constitutionally chargeable to objecting employees, *id.* at 236-37. The Court recognized, however, that the line between chargeable and nonchargeable expenditures "may be somewhat hazier" in the public sector than under the RLA, *id.* at 236, observing, for example, that "the ease of negotiating a final agreement [in the public sector] may be severely limited by statutory restrictions, by the need for the approval of a higher executive authority or a legislative body, or by the commitment of budgetary decisions of critical importance to others." *Id.* at 228. To illustrate this point, the Court stated that "[t]he process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities," and that "related budgetary and appropriations decisions might be seen as an integral part of the bargaining process." *Id.* at 236. Furthermore, the Court noted that successful bargaining in the public-sector involves "a blend of political ingredients, including community sentiment about unionism generally and the involved union in particular, the degree of taxpayer resistance, and the

views of voters as to the importance of the service involved and the relation between the demands and the quality of service." *Id.* at 228.

The Court again addressed the line between chargeable and nonchargeable expenditures in *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), which involved a union-shop provision negotiated under the RLA as part of a collective bargaining agreement between Western Airlines and the Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express & Station Employes, its intermediate System Board of Adjustment, and three of its local affiliates at Western Airlines (collectively "BRAC"). The objecting employees contended that they could "be compelled to contribute no more than their pro rata share of the expenses of negotiating agreements and settling grievances with Western Airlines," 466 U.S. at 439, and on that basis challenged the use of their fees to finance six activities of the national union —*i.e.*, the quadrennial convention; social activities; publication of a monthly magazine; general organizing efforts; litigation; and a death benefits program. 466 U.S. at 440. In ruling on these six expenditures, the Court first considered their chargeability under the RLA, articulating the following statutory standard:

> [T]he test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of *not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.* [466 U.S. at 448 (emphasis added).]

Applying this statutory standard to the six challenged expenditures, *id.* at 448-55, the Court found the full cost

of conventions and social activities, and part of the costs of publications and litigation, chargeable to objecting employees under the RLA. The Court then turned separately to the constitutional issues raised by the case, concluding that the expenditures that it found chargeable under the RLA were "well within the acceptable [constitutional] range." *Id.* at 457. The Court first noted that "by allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights," and that this impingement "is justified by the governmental interest in labor peace." *Id.* at 455-56. The determinative issue was "whether these expenses involve additional interference with the First Amendment interests of objecting employees, and, if so, whether they are nonetheless adequately supported by a governmental interest." *Id.* at 456.

With regard to BRAC's expenditures for social activities, the Court held that the only "communicative content" of the compelled subsidy was the fact that such activities were sponsored by the national union: *i.e.*, "that these are *union* social hours." *Id.* at 456 (emphasis in original). This fact, the Court held, already had been taken into account when allowing the union shop, and thus forcing employees to contribute to social activities of the national union "does not increase the infringement of . . . First Amendment rights already resulting from the compelled contribution to the union." *Id.*

The Court recognized that the national union's conventions and publications "have direct communicative content and involve the expression of ideas," but nonetheless held that there was "little additional infringement of First Amendment rights beyond that already accepted, and none that is not justified by the governmental interests behind the union shop itself." *Id.* In this regard, the Court observed that

> [t]he very nature of the free-rider problem and the governmental interest in overcoming it require that the union have a certain flexibility in its use of compelled funds. " 'The furtherance of the common cause leaves some leeway for the leadership of the

group.'" [*Id.* at 456-57 (quoting *Abood*, 431 U.S. at 221-22, and *Street*, 367 U.S. at 778 (Douglas, J., concurring).] [7]

Finally, last Term, the Court addressed the issue of constitutionally chargeable activities in the context of an "integrated bar" that requires dues payments as a condition of practicing law. In *Keller v. State Bar*, 110 S. Ct. 2228 (1990), the Court made it clear that the statutory standard adopted in *Ellis*, *see supra* at 10, had constitutional application, noting that the *Ellis* "principles are useful guidelines for determining per-

[7] Although the Court also concluded that certain costs of litigation were chargeable under the RLA, 466 U.S. at 453, these costs were not specifically addressed in its constitutional analysis. It is implicit in the Court's opinion, however, that such litigation costs constitutionally may be charged to objecting employees.

The holding in *Ellis*, it should be noted, is squarely at odds with petitioners' alternative formulation of the chargeability standard—*i.e.*, that a bargaining representative may charge objecting employees only for those activities that it has a statutory "obligation to perform" or that it is obliged to perform under its duty of fair representation. *See* P. Br. at 14. BRAC was not required by the RLA or its duty of fair representation to perform any of the activities that the Court determined were constitutionally chargeable. Indeed, under Michigan law, and all other labor relations statutes in both the public and private sectors, a bargaining representative has an *affirmative* statutory obligation to undertake very few activities, and the duty of fair representation only requires a bargaining representative to treat all employees in the bargaining unit equitably in regard to those activities that it does choose to undertake. For example, FFA would not be in breach of any statutory obligation if it chose to engage in collective bargaining only with regard to wages or to process grievances only in the most narrow of circumstances, which means that most of the costs of collective bargaining and grievance processing would fall on the nonchargeable side of the line posited by petitioners.

The foregoing should be correctly understood. We certainly have no quarrel with the proposition that "[t]he designation of a union as exclusive representative carries with it great responsibilities," *Abood*, 431 U.S. at 221, but for the most part these are self-generated responsibilities, which reflect a union's institutional commitment to advance "the cause which justified bringing the group together," *id.* at 223 (citation omitted). These responsibilities are not limited to the bargaining representative's statutory obligations or its duty of fair representation.

missible expenditures in the present [constitutional] context as well." 110 S. Ct. at 2236. Although the Court did not attempt to discern "[p]recisely where the line falls," *id.* at 2237, between chargeable and nonchargeable activities, it focused once again on whether particular activities are "'germane' to the purpose for which compelled association was justified," *id.* at 2236 (quoting *Abood*). Thus, the Court stated that bar activities are chargeable if they are related to "the purpose of regulating the legal profession or 'improving the quality of legal service available,'" but are nonchargeable if they "hav[e] political or ideological coloration [and] are not reasonably related to the advancement of such goals." *Id.* at 2236-37.

In sum, prior decisions of this Court firmly have established that, because the agency shop "serves vital national interests in preserving industrial peace," it is constitutional to charge objecting employees for activities of a bargaining representative that are "germane" to the "purpose for which the compelled association was justified: collective bargaining." *Keller*, 110 S. Ct. at 2236. These activities include "not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative." *Ellis*, 466 U.S. at 448. *See id.* at 456 (even if union expenses involve additional interference with First Amendment rights, the issue is "whether they are nonetheless adequately supported by a governmental interest").[8]

[8] Although petitioners seek to support their position by reference to various statements drawn from this Court's prior decisions, many of these statements are torn from their context and, in some instances, actually misquoted. By way of example: (1) Petitioners repeatedly misquote the standard for chargeability that the Court adopted under the RLA in *Ellis*, 466 U.S. at 448, first by deleting the words "or reasonably" from the statement that "chargeable costs must be 'necessarily * * * incurred for the purpose of performing the duties of an exclusive representative,'" P. Br. at 10,

II. A BARGAINING REPRESENTATIVE CONSTITUTIONALLY MAY CHARGE OBJECTING EMPLOYEES FOR OTHERWISE CHARGEABLE ACTIVITIES OF ITS AFFILIATED PARENT ORGANIZATIONS, EVEN IF THOSE ACTIVITIES ARE NOT UNDERTAKEN DIRECTLY ON BEHALF OF THE BARGAINING UNIT TO WHICH THEY BELONG

Petitioners argue that the courts below erred in holding that they may be required to contribute to the costs of collective bargaining and other chargeable activities

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and then by deleting the words "not only" and "but also" from the statement that "objecting employees may be compelled to pay their fair share of * * * the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, [and] the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative," *id.* at 14-15. (2) Petitioners also misrepresent the decision in *Keller* by emphasizing the word "essentially" to suggest that the Court used that word as an adjective describing activities that are necessary or indispensable, when in fact the Court used the word "essentially" as an adverb to mean "in the same manner as." *Compare* 110 S. Ct. at 2237 (chargeable activities include "activities in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession") *with* P. Br. at 12 ("objectors' dues constitutionally may be used only when the Bar is 'acting *essentially*' in . . . regulating the legal profession") (emphasis in original).

As a substantive matter, petitioners place primary reliance for their view that "strict scrutiny" must be applied to every challenged union expenditure on the separate opinion in *Abood* that was authored by Justice Powell. *See* P. Br. at 7-9 & n.5 (quoting 431 U.S. at 255, 259 (concurring in the judgment)). But Justice Powell was a *dissenter* in *Abood*, and his disagreement with the majority focused precisely upon the fact that, in his view, the majority did *not* subject either the overall justification for the union-shop or the specific union expenditures financed by exacted fees to traditional First Amendment strict scrutiny. *Compare* 431 U.S. at 222 (majority opinion) ("the judgment clearly made in *Hanson* and *Street* is that *such interference as exists* is constitutionally justified by the legislative assessment of the *important* contribution of the union shop") *with id.* at 255 (Powell, J.) ("the State should bear the burden of proving that any [exacted] union

that are undertaken by MEA and NEA "on behalf of persons not employed in their bargaining unit." P. Br. at 18-19.[9] This argument, however, totally misses the point of union affiliation.

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dues or fees . . . are *needed* to serve *paramount* government interests") (emphasis supplied). Indeed, the aspect of Justice Powell's separate opinion in *Abood* that is most pertinent in the present context is his characterization of the majority opinion: "[T]he Court . . . decides that compelling an employee to finance any union activity that may be 'related' in some way to collective bargaining is permissible under the First Amendment because such compulsion is 'relevant or appropriate' to asserted governmental interests," 431 U.S. at 254.

Similarly unavailing is petitioners' reliance on *Hudson, supra.* Although establishing a procedural framework for protecting the constitutional rights of nonmember employees, the decision in *Hudson* does not indicate—and the rationale of the Court does not in any way suggest—that specific procedures adopted by unions to operate within this framework must be reviewed under the aegis of "strict scrutiny." To the contrary, the decision in *Hudson* expressly allows unions to calculate the amount of their service fee with less than "[a]bsolute precision," 475 U.S. at 307 n.18, to collect fees after providing nonmember employees with only "an adequate explanation of the basis for the fee," *id.* at 306, 310, to collect fees without a predeprivation hearing, *id.* at 309, 310, to provide objecting employees with expeditious arbitrations that do not utilize full evidentiary safeguards, *id.* at 308 n.21, and to escrow less than 100% of the fee paid by objecting employees while challenges to the fee are pending, *id.* at 310. In these and other areas, the Court plainly refused to impose on unions various procedural requirements that, because they might be more protective of First Amendment interests, would be required under the "strict scrutiny" standard urged by petitioners.

[9] There is no dispute that at least certain expenditures that are made by a bargaining representative's affiliated parent organizations may be charged to objecting employees. *See Hudson*, 475 U.S. at 307 n.18 (noting that, upon proper showing, objecting employees may be charged for "an item such as the Union's payment of $2,167,000 to its affiliated state and national labor organizations"). Thus, for example, if MEA or NEA assigned lawyers, negotiators, or other experts to assist FFA in negotiating a collective bargaining agreement with Ferris State College or in processing a grievance, the costs of this assistance to FAA, which would be for the direct benefit of the employes in the FAA bar-

The expenditure at issue—and the one that properly must satisfy the First Amendment—is *not* the cost of specific activities that are undertaken by MEA and NEA on behalf of other bargaining units in Michigan or elsewhere. Rather, it is the cost to FFA of maintaining its affiliation relationship with MEA and NEA. And in determining whether this cost is chargeable, the Court must consider whether FFA is enabled through that affiliation to more effectively "implement or effectuate [its] duties . . . as exclusive representative of the employees in the [petitioners'] bargaining unit." *Ellis*, 466 U.S. at 448. As we now demonstrate, the answer to this question clearly is yes.

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gaining unit, clearly would be chargeable. Petitioners presumably also would concede the chargeability of expenditures for MEA and NEA activities that benefit employees in all bargaining units represented by MEA and NEA affiliates, including the FFA bargaining unit. By way of illustration, NEA might produce research reports on issues of concern to all educational employees, such as studies relating to collective bargaining techniques or to the processing of grievances. Because these "indivisible" services assist FFA in the performance of its duties as bargaining representative, albeit in a less direct manner than discrete services provided exclusively to the FFA bargaining unit, it would follow that objecting employees in the FFA bargaining unit could be charged their pro-rata portion of the costs. *See* P. Br. at 23 ("The pro rata costs of ['services provided simultaneously to more than one unit, such as general research or training'], if chargeable in nature, can easily be determined by dividing their total costs by the number of employees in all units which receive them."). *But see infra* note 23.

What really separates the parties in this case is the chargeability of a third category of expenditures by MEA and NEA—*i.e.*, expenditures for activities that assist particular bargaining units throughout Michigan or in other States, but in any specific year may not directly benefit the employees represented by FFA. For instance, NEA may expend thousands of dollars to provide assistance during a bargaining crisis to employees represented by an affiliate in New Jersey, or MEA may provide resources to assist another bargaining unit in Michigan in the handling of a complex arbitration. Because it is essentially expenditures of this type that petitioners contend may not constitutionally be charged to objecting employees in the FFA bargaining unit, *see, e.g.*, P. Br. at 18, it is this contention that we address—and rebut—in text.

1. The appropriate starting point for analysis is the judgment made by the Michigan Legislature when it authorized public employee unions to collect service fees from nonmember employees:

> [T]he stability and effectiveness of labor relations in the public sector require . . . that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative.

Mich. Comp. Laws § 423.210(2).[10] To implement this legislative judgment, Michigan law provides that all nonmember employees may be required to pay a service fee that is based on, but may not exceed, "the amount of dues uniformly required of members of the exclusive bargaining representative." *Id.*; *id.* § 423.210(1)(c). Inasmuch as members of FFA are required to pay annual dues that include payments to FFA's state and national affiliates, the "dues uniformly required of members" of FFA includes payments that are transmitted to MEA and NEA.

Moreover, the Michigan Employment Relations Commission ("MERC")—the state agency responsible for interpreting and administering Michigan's service-fee statute—repeatedly has concluded that it serves Michigan's governmental interest in labor peace to require nonmember employees to pay their fair share of the chargeable expenditures of a bargaining representative's affiliated state and national organizations, regardless of whether those expenditures are made directly on behalf of employees in the particular bargaining unit. For example, in its 1986 decision in *Bridgeport-Spaulding Com-*

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[10] Thus, much like the congressional judgment that led to enactment of the union-shop provisions in the RLA and the National Labor Relations Act, the Michigan Legislature has "determined that it would promote peaceful labor relations to permit a union and an employer to conclude an agreement requiring employees who obtain the benefit of union representation to share its costs." *Abood*, 431 U.S. at 219; *see id.* at 224 ("[t]he desirability of labor peace is no less important in the public sector, nor is the risk of 'free riders' any smaller").

munity Schools, 1986 MERC Op. 1024, MERC held that chargeable expenditures are *not* limited "to expenditures incurred directly or exclusively for the benefit of the bargaining unit to which the objecting nonmember belongs," but rather include "some of the costs of representation in other units," *id.* at 1029; *id.* at 1057 ("to restrict chargeability to only those activities directly relating to the local bargaining unit is to totally ignore the fact of affiliation").[11]

Because this Court's "province is not to judge the wisdom of Michigan's decision," but only "to adjudicate the constitutionality of that decision," the only remaining question is whether this "legislative judgment was . . . an allowable one." *Abood*, 431 U.S. at 219, 224-25.[12] And an understanding of the reasons why employees choose to be represented by local unions that are affiliated with one or more larger unions, and the benefits that derive from such affiliation, dictate an affirmative answer to this question.

2. This Court has recognized that

> [t]he designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-

[11] *See also Garden City School District*, 1978 MERC Op. 1145, 1155-56; *Swartz Creek Community Schools*, 1971 MERC Op. 645, 653.

[12] Although this case necessarily is presented as a challenge to the judgment of the Michigan Legislature, precisely the same judgment has been made by every other State that has authorized the negotiation of agency-shop agreements, *see, e.g.*, Ill. Rev. Stat. ch. 48, § 1711 (requiring employees to pay a fair share fee "not to exceed the dues uniformly required of members"); *Abels v. Monroe County Educ. Ass'n*, 489 N.E.2d 533, 537-38 (Ind. App. 1986), *cert. denied*, 480 U.S. 905 (1987), and by Congress when enacting union-shop provisions in the RLA and the National Labor Relations Act, *see* 45 U.S.C. § 152, Eleventh (requiring employees to pay dues, initiation fees, and assessments "uniformly required as a condition of acquiring or retaining membership"); 29 U.S.C. § 158(a)(3) (requiring employees to pay dues and initiation fees "uniformly required as a condition of acquiring or retaining membership").

> bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money. . . . The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required. [*Abood*, 431 U.S. at 221 (citation omitted).]

Local unions, such as FFA, affiliate with more broad-based labor organizations, such as MEA and NEA, in order to have access to services that will enable them to perform these "continuing and difficult" tasks more effectively.[13] Under the typical affiliation arrangement, a local bargaining representative agrees to make predetermined payments to larger labor organizations in return for services. These periodic payments (usually a per capita payment for each employee represented) are used by the affiliated parent organizations not only to defray the costs of the actual services that they may be called upon to provide to the local union, but also to ensure that those services are available to the local union, at all times, on an "as-needed" basis. In effect, affiliation enables the local union to stabilize the costs of its collective bargaining, contract administration, and grievance adjustment, and to spread those costs across a large number of bargaining units. Indeed, the employees in many bargaining units may be either unable or unwilling to amass the kind of financial and other re-

[13] Affiliation between a local union and more broad-based labor organizations is a well-established means of improving a local union's ability to provide efficient and effective representation for the members of a bargaining unit. *See NLRB v. Financial Institution Employees*, 475 U.S. 192, 199 n.5 (1986) ("[a] local union may seek to affiliate with a larger organization for a variety of reasons," including that "[t]he larger organization may provide bargaining expertise or financial support, or may compensate for a lack of leadership within the local union"); *Bridgeport-Spaulding*, 1986 MERC Op. at 1061-62 (the practical benefits of affiliation include "the opportunity to utilize the expertise of state and national organizations . . . relat[ing] to collective bargaining methods and goals").

sources necessary for their bargaining representative to function effectively during those years in which a collective bargaining agreement must be renegotiated or a major arbitration must be pursued. For these employees, an affiliation relationship with larger organizations may be the only feasible way to ensure that the necessary services will be available.[14]

In essence, the affiliation of a local union with larger labor organizations—like FFA's affiliation with MEA and NEA [15]—is analogous to the purchase of an insurance policy or to membership in an organization that guarantees services on demand for a predetermined annual rate. A person who joins the American Automobile Association, for example, pays a flat amount of dues

[14] *See, e.g.*, M. Estey, *The Unions: Structure, Development, and Management* 74 (3d ed. 1981) (noting that "the growing complexity of collective bargaining problems . . . has led unions, like their business counterparts, to make increasing use of staff specialists—economists, lawyers, accountants, etc.," and that "[t]he sheer expense of maintaining such staffs is beyond the resources of most local unions; [and] only national unions can afford it"); L. Ulman, *The Rise of the National Trade Union* 176, 185, 188-89 (1955) (noting that the development of national unions occurred, in part, because "[i]t was necessary for [local unions] to accumulate resources in periods of industrial peace," and there was a "need for financing strikes on this type of insurance basis"); J. Wallihan, *Union Government and Organizaiton in the United States* 18 (1985) (noting that "[u]nions, as service organizations, provide aid to their members and others, . . . much like an insurance agency to which they pay premiums with the expectation of returns and a guarantee of service should the need arise").

[15] Although the members of the bargaining unit at Ferris State College could have chosen to be represented by an independent or unaffiliated labor organization, a majority decided that it was in their best interests to be represented by a local union that had an affiliation relationship with MEA and NEA. As the courts below recognized, and as the official name of FFA (*i.e.*, the Ferris Faculty Association-MEA-NEA) reflects, the "'union as affiliated is the exclusive representative'" under Michigan law. *See* PA 6a, 58a (quoting *Bridgeport-Spaulding*, 1986 MERC Op. at 1062); *Kalkaska Public Schools*, 1978 MERC Op. 1052, 1056 ("affiliation has become an established pattern in the American labor movement").

each year, and in return is guaranteed emergency road service, travel assistance, bail bond protection, and other services normally provided by that organization. Similarly, a health maintenance organization "provides a wide range of health care services to a defined, enrolled population for a predetermined, prepaid premium [that is] unrelated to the actual number of services utilized by an enrollee in a particular time period." *See* Health Maintenance Organization Act of 1973, S. Rep. No. 129, 93d Cong., 1st Sess. 2, *reprinted in* 1973 U.S. Code Cong. & Admin. News 3033, 3034. In one year, no services may be needed; in the next year, several services may be utilized each month. In either case, the member pays the same annual amount.

In a similar fashion, by affiliating with MEA and NEA, the employees that FFA represents are able to pay a flat amount of dues or fees and, in return, are both assured of regular assistance in matters relating to collective bargaining, contract administration, and grievance adjustment, and "insured" against catastrophic expenses with regard to these matters. To be sure, MEA and/or NEA in any particular year may provide limited direct services to the FFA bargaining unit, and instead may expend their considerable resources to assist bargaining units in other parts of Michigan or in other States. But during a year when FFA is involved in renegotiating its collective bargaining agreement or in arbitrating a complex grievance, MEA and/or NEA may provide extensive assistance to the employees represented by FFA (well in excess of the annual amount that they receive in dues and fees). In either case, by deciding to affiliate with MEA and NEA, the members of FFA have agreed to pay the same flat amount each year in return for the constant *availability* of these services on an *as-needed* basis.[16]

[16] To give a concrete example involving the expenditures held chargeable by the courts below, all employees paying service fees to local unions affiliated with NEA—including those in the FFA bargaining unit—contribute to the cost of maintaining the programs through which NEA provides collective bargaining and research

Thus, petitioners are mistaken when they characterize the union's service-fee system as one that makes employees at Ferris State College pay for services provided to other bargaining units represented by MEA and NEA affiliates. The reality, as the District Court found, PA 56a, is that these employees are paying for a benefit that currently is being provided to them by their bargaining representative—*i.e.*, the *availability* of services germane to collective bargaining, contract administration, and grievance adjustment. And, as we now show, the First Amendment does not prohibit FFA from charging petitioners for their fair share of this benefit.

3. The decision by the members of FFA to affiliate with MEA and NEA, and to pool FFA's resources with those of other local unions, is a cost-effective (and, indeed, the most commonly adopted) method[17] of ensuring that services are available to members of a local bargaining unit. And we are aware of no principle embodied in the First Amendment that would prohibit FFA from choosing to "operate on a cost-sharing basis," especially when, as the District Court found, this "cooperative cross-funding enables the union to effectively represent individual members . . . while maintaining stable dues levels." PA 56a. To use the words of this Court, affiliating for this purpose is an "activit[y] or

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assistance. *See supra* at 5-6. Although FFA may not have occasion to avail itself of this assistance every year, it is not correct to argue, as do petitioners, that in years when it does not require such assistance FFA is paying NEA for nothing, or that FFA is simply supporting assistance provided to other units. The fact that NEA support is "waiting in the wings" is of benefit to FFA at any time that FFA is negotiating, administering, or adjusting grievances under its collective bargaining agreement.

[17] *See* Bureau of Labor Statstics, U.S. Department of Labor, *Directory of National Unions and Employee Associations* 77-78 (1975); D. Martin, *An Ownership Theory of the Trade Union* 39 (1980) (in 1974, union membership was distributed among 69,468 affiliated locals, whereas a 1967 survey revealed only 884 locals unaffiliated with national unions); R. Freeman & J. Medoff, *What Do Unions Do?* 35 (1984) ("[v]irtually all local unions are part of international unions").

undertaking[] *normally or reasonably employed* to implement or effectuate the duties of the union," 466 U.S. at 448 (emphasis added), that falls squarely within the "flexibility in [the] use of compelled funds" that the Court repeatedly has granted to unions faced with the "continuing and difficult" task of representing employees, *id.* at 456; *Abood*, 431 U.S. at 221. The payment of dues and fees to affiliated state and national organizations is no more, and no less, than the implementation of the "group's strategy" to further the collective interests of the employees represented by FFA. *Id.* at 223.[18]

Nor does the First Amendment prohibit a bargaining representative from providing services to its members by averaging the amount of its service fees over several years instead of allowing fee levels to fluctuate wildly from year to year. If objecting employees had to be charged for the actual costs of representing their bargaining unit in any given year on a "pay-as-you-go" basis, they would be required to pay differing amounts of fees in each year, including exorbitant fees in those years when especially heavy expenses were incurred in representing the bargaining unit.[19] Moreover, because of constant changes in the membership of the bargaining unit due to normal turnover in personnel, such a system would mean that some employees would have to shoulder a disproportionate burden in financing the activities of their exclusive representative, even though the benefits obtained by the union normally are spread evenly across

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[18] For this reason, petitioners' assertion that the decision of FFA to operate on a cost-sharing basis "is a voluntary decision made by unions, not a circumstance compelled by the state, much less a vital state interest," P. Br. at 21, although correct, is completely beside the point.

[19] Unless the bargaining representative also were to structure its membership dues on a pay-as-you-go basis—an arrangement that would make if difficult, if not impossible, for the local union to pay its rent, meet its payroll, fulfill its annual financial obligations to affiliated organizations, etc.—the nonmembers in these years would be required to bear a disproportionate share of the costs of representation. *See infra* note 21.

the years.[20] The provision in the Michigan statute that limits service fees to "the amount of dues uniformly required by members" reflects an awareness of these problems and, like all other laws authorizing union or agency shops that incorporate "dues levels . . . as benchmarks for service fees," PA 56a; *supra* note 12, encourages unions to adopt fee levels that are relatively stable from year to year.[21]

Perhaps most important, the decision by the members of FFA to secure services through affiliation is an administrative determination that does not "involve additional interference with the First Amendment interests of objecting employees" beyond that already countenanced by acceptance of the agency shop itself. *Ellis*, 466 U.S. at 456. Petitioners' complaint about contributing their service fees to the costs of FFA's affiliation arrangement with MEA and NEA does not relate to the communicative or expressive content of the services that these organizations make available to other bargaining units, inasmuch as they are charged only for the cost of activities of these parent organizations that are germane

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[20] When MEA or NEA assists FFA in negotiating a collective bargaining agreement, for example, the value of that assistance is realized not only in the year in question, but at the very least throughout the term of the agreement.

[21] The fact that Michigan's service-fee statute imposes this limit on fees also means that, under the type of pay-as-you-go service fee arrangement proposed by petitioners, objecting employees would receive a windfall, and become free riders, in those years when their proportionate share of these costs exceeded dues. As the District Court aptly put it:

> [Petitioners' position] would *logically* lead to drastic fluctuations in the amount of the service fee charged to the objecting nonmembers of individual units. Nevertheless, because most union/agency shop statutes tie the amount of the service fee to the amount of ordinary union dues, service fees can never legally exceed dues. Therefore, a unit-by-unit breakdown of chargeable expenses would only exacerbate the free rider problem and thereby frustrate the governmental interest that the Court has repeatedly recognized lies at the heart of statutes authorizing union/agency shops. [PA 56a-57a (emphasis in original).]

to collective bargaining, and therefore would be chargeable if performed on behalf of the FFA bargaining unit itself. Rather, petitioners' complaint stems from the fact that these payments are being made for activities that are being performed for bargaining units other than that represented by FFA. Much like the challenge of the objecting employees to social activities in *Ellis*, "the fact that [petitioners are] forced to contribute [to MEA and NEA] does not increase the infringement of [their] First Amendment rights. . . . Petitioners may feel that their money is not being well-spent, but that does not mean they have a First Amendment complaint." *Id.* at 456.

Finally, after noting that MEA has "800-900 local affiliates such as the FFA," and that NEA "represents approximately 12,000 bargaining units nationwide," PA 32a, 39a, the District Court found that "imposing a . . . requirement of a unit-by-unit breakdown" for all activities of MEA and NEA "would create an unreasonable and unmanageable administrative burden" on these unions. PA 57a. To support this finding, the court first stated that it was "not warranted by the facts at trial" to assume that MEA and NEA would be "able to break-out discrete expenses by bargaining unit." *Id.* In many instances, it literally would be impossible to allocate costs to any individual bargaining unit, such as FFA, that was one of many benefitting simultaneously from MEA or NEA activities. And even for those services that are directly attributable to a particular bargaining unit, any attempt to keep accounting records for those costs would create an overwhelming administrative and financial burden.[22] Moreover, even assuming *arguendo* that it were possible for MEA and NEA to create accounting systems to accommodate the calculation of the service

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[22] Witnesses before the District Court repeatedly testified that it would be "virtually impossible" or "not . . . even possible from a practical standpoint" for either MEA or NEA to allocate their costs to hundreds or thousands of individual bargaining units. *See* JA 22-23, 23, 35-36, 42, 42-43, 46, 84-85, 87-88, 108.

fee on a unit-by-unit basis,[23] the District Court concluded that "the marginal revenue received from service fee payors would not justify the cost of modifying the existing accounting systems to accommodate [such a] requirement," PA 57a, and therefore requiring a unit-by-unit breakdown of chargeable expenses "would be 'likely to infringe the union's right to expend *uniform exactions* under the [agency] shop agreement in support of activities germane to collective bargaining,'" PA 57a (emphasis in original) (quoting *Allen*, 373 U.S. at 122). *See Hudson*, 475 U.S. at 302 (" 'the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto *without restricting* the Union's ability to require every employee to contribute to the cost of collective-bargaining activities' ") (quoting *Abood*, 431 U.S. at 237) (emphasis added).

4. Rather than addressing the underlying question of how affiliation with MEA and NEA impacts on FFA's ability to function as their bargaining representative, petitioners principally argue that the Court in *Ellis* already has adopted their position that the First Amendment prohibits unions from charging objecting employees for the cost of affiliation. Petitioners' reliance on *Ellis*, however, is misplaced.

In *Ellis*, the objecting employees were subject to a union-shop provision that had been negotiated under the RLA between their employer, Western Airlines, and their exclusive bargaining representative, BRAC. 466

[23] Petitioners' assertion that "[t]he pro rata costs of ['services provided simultaneously to more than one unit, such as general research or training,'] if chargeable in nature, can easily be determined by dividing their total costs by the number of employees in all units which receive them," P. Br. at 23, hardly provides an adequate answer. To begin with, the accounting problems referenced in text would surface in attempting to determine "the number of employees in all units which receive" the services in question during a particular year. Moreover, even if this determination could be made, it would not allow bargaining representatives to charge for the *availability* of services which employees in the bargaining unit do not actually "receive" during a particular year.

U.S. at 439. In affirming the chargeability of three activities of the national union—the quadrennial convention of the national union; social activities sponsored by the national union; and the monthly magazine published by the national union—the Court obviously found no merit in the contention of the objecting employees that they could "be compelled to contribute no more than their pro rata share of the expenses of negotiating agreements and settling grievances *with Western Airlines*." *Id.* at 439 (emphasis added). With regard to conventions, for example, the Court noted that BRAC's quadrennial gathering was a "national convention at which the members elect officers, establish bargaining goals and priorities, and formulate overall union policy," which means that the convention was not limited to concerns specific to the bargaining unit at Western Airlines. *Id.* at 448.[24] Similarly, the social activities held chargeable to objecting employees were "Grand Lodge [*i.e.*, national] expenditures," *id.* at 449, and again were not keyed directly to the employees in the bargaining unit at Western Airlines. And finally, the Court held that objecting employees could be charged for the cost of producing the national union magazine, which included "articles about negotiations, contract demands, strikes, unemployment and health benefits, proposed or recently enacted legislation, general news, products the union is boycotting, and recreational and social activities" that obviously concerned bargaining units other than Western Airlines. *Id.* at 450 (citing 685 F.2d 1065, 1074 (9th Cir. 1982)).[25]

[24] At the time of this convention, the national union represented hundreds of thousands of employees, in bargaining units throughout the country, in the railroad, airline, and maritime industries. 91 L.R.R.M. 2339, 2340, 2342 (S.D. Cal. 1976).

[25] Petitioners make much of the fact that *Ellis* held union organizing (and reporting about such organizing) to be nonchargeable. *See* P. Br. at 19. But the Court did not base this holding on the unit-by-unit standard urged by petitioners. Rather, the Court in *Ellis* held that organizing, whether conducted within the objector's bargaining unit or outside the unit, *see* 466 U.S. at 452 & n.13, is not sufficiently related to a union's duties as

Thus, the decision in *Ellis* does not support petitioners' assertion that chargeable activities are subject to a "bargaining-unit limitation." To the contrary, *Ellis* demonstrates that petitioners may be required, consistent with the First Amendment, to pay their fair share of the costs of collective bargaining and other chargeable activities that MEA and NEA undertake on behalf of employees in other bargaining units.

III. BECAUSE THE SPECIFIC EXPENDITURES CHALLENGED BY PETITIONERS ARE FOR ACTIVITIES GERMANE TO COLLECTIVE BARGAINING, THEY ARE CONSTITUTIONALLY CHARGEABLE TO OBJECTING EMPLOYEES

A. Lobbying On Matters Germane To Collective Bargaining

Petitioners challenge the decision of the courts below allowing the unions to charge them for the cost of lobbying legislative or executive officials on matters "directly related to collective bargaining, contract administration or the terms and conditions of employment." PA 52a-53a; *see* PA 7a (lobbying is chargeable if the subject matter is " 'pertinent to the duties of the union as a bargaining representative' ") (quoting *Robinson v. New Jersey*, 741 F.2d 598 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985)).[26] This challenge is without merit. Because, as we now show, such lobbying activities not only are germane, but in fact are vital, to effective collective bargaining in the public sector, no principle embodied in the First Amendment prohibits unions from charging objecting employees for the costs of these activities.

1. The starting point again is the judgment reached by the State of Michigan. Recognizing that collective negotiations and other direct dealings with the employer are not the only means by which unions representing public employees "act to promote the cause which justified bringing the group together," *Abood*, 431 U.S. at 223, Michigan has decided that it serves the State's interest in "industrial peace and stabilized labor-management relations," *id.* at 219, to require all union-represented public employees to pay for the costs of certain activities that relate to collective bargaining, but that occur at places other than the bargaining table.

Chief among these activities is lobbying of government officials with regard to matters related to wages, hours, and other terms and conditions of employment. Consistent with this Court's decision in *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), Michigan has recognized that "labor's

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bargaining representative under the RLA to be chargeable at all, *id.* at 451-53. (We note in this regard that petitioners mischaracterize the decision of the District Court when they repeatedly state that it allowed the unions to charge objecting employees for the costs of "organizing" other bargaining units. *See* P. Br. at 17, 20-21. To the contrary, the District Court held that "the union defendants' expenditures for organizing are not chargeable," PA 55a (relying on *Ellis*), and this aspect of the lower court's judgment was not appealed. *See Bridgeport-Spaulding*, 1986 MERC Op. at 1030 ("organizing expenses should not be considered chargeable expenditures" under Michigan law.)) Nor did the Court's unique treatment of "general litigation" costs under the RLA announce any constitutional requirement of a unit-by-unit breakdown of the costs of services provided by a national union. *See id.* at 441, 453, 455. Indeed, the fact that the Court imposed such a statutory requirement for this one activity suggests that the Court's failure to require a unit-by-unit breakdown of constitutionally chargeable expenditures for other activities was not inadvertent.

[26] The specific lobbying activities found chargeable by the courts below include the following: (1) $149.99 expended by FFA on the PPE Conference, which was concerned with lobbying for "legislative appropriations" to ensure "funding for employment positions, salaries and benefits," PA 8a, 58a; *supra* at 3; (2) monies expended by MEA to publish articles in the *Teacher's Voice* reporting on MEA and NEA lobbying efforts with regard to specific terms and conditions of employment (*e.g.*, retirement and pension legislation, JA 206, 207, 208; laws governing length of school day and school year, JA 212; rules mandating in-service training, JA 216) and increased funding for public education, *see* PA 9a-10a & n.1, 63a, 80a; and (3) monies expended by the Research area of NEA, as part of its "Collective Bargaining/Benefits Services," to prepare reports on legislative activity affecting retirement and pensions for public employees, *see* JA 297-98.

cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context," *id.* at 565, and that employees frequently "seek to improve working conditions through resort to administrative and judicial forums," or through "appeals to legislators to protect their interests as employees," *id.* at 566. Based on this view of union representation, MERC has decided that "[l]obbying . . . aimed primarily at improving funding for education or securing legislation which will improve employment conditions" is "closely tied to collective bargaining issues and [therefore is] properly charged" to objecting employees. *Bridgeport-Spaulding*, 1986 MERC Op. at 1029, 1066; *see id.* at 1065 ("collective bargaining in the public sector requires resort to the legislature on various employment related questions"). The question presented by this case is whether that decision is "within the acceptable [constitutional] range." *Ellis*, 466 U.S. at 457.[27] As we demonstrate below, because resort to the legislative (or other governmental) forum to protect the interests of represented employees " 'relat[es] to the work of

[27] The same decision has been made by virtually every State that has authorized the agency shop as part of its labor-relations system for public employees. *See, e.g.*, Cal. Govt. Code § 3515.8 (objecting employees may be required to pay "the costs of support of lobbying activities designed to foster policy goals and collective negotiations and contract administration, or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employer"); Mass. Gen. L. ch. 150E, § 12 (objecting employees may *not* be required to pay for "efforts to enact, defeat, repeal or amend legislation *unrelated* to the wages, hours, standards or productivity and performance, and other terms and conditions or employment, and the welfare or the working environment of employees represented") (emphasis added); N.J.S.A. 34:13A-5.5c (objecting employees may be required to pay "the costs of support of lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through collective negotiations with the public employer").

the union in the realm of collective bargaining,' " *Ellis*, 466 U.S. at 456 (quoting *Hanson*, 351 U.S. at 235), the answer is yes.[28]

2. Employee representation through collective bargaining in the public sector "is a process of governmental decisionmaking shaped ultimately by political forces." Summers, *Public Employee Bargaining: A Political Perspective*, 83 Yale L.J. 1156, 1156 (1974); *Abood*, 431 U.S. at 228 (decisionmaking by a public employer engaged in collective bargaining "is above all a political process"). This "distinctive nature of public-sector bargaining" is based on " 'the special character of the [public] employer,' " *id.* 431 at 229, 230 (quoting Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 U. Cin. L. Rev. 669, 670 (1975)), which is comprised of "different managers, budgetary officials, and legislative bodies," 431 U.S. at 228. As the Court in *Abood* expressly recognized, "the ease of negotiating a final agreement with the union [in the public sector] may be severely limited by statutory restrictions, by the need for the approval of a higher executive authority or a legislative body, or by the commitment of budgetary decisions of critical importance to others." *Id.* The fact that the legislative and executive branches have retained such significant decisionmaking authority over matters that affect the results of collective bargaining leaves a public-sector bargaining representative with little choice but to engage in lobbying of government officials with regard to these matters.

A review of public-sector labor relations in Michigan,

[28] Unions representing employees in the private sector likewise have recognized the important relationship between collective bargaining over terms and conditions of employment and lobbying with regard to statutes or regulations governing these issues, and traditionally have engaged in extensive lobbying to support the enactment and implementation of statutes that guarantee benefits or provide protections to the employees whom they represent. For purposes of this case, however, it is necessary to deal only with unions representing public employees.

and the lobbying expenses held chargeable by the courts below, amply illustrate this point.

First, the Michigan Constitution authorizes the State Legislature to enact laws that provide "for the resolution of disputes concerning public employees" and that "relat[e] to the hours and conditions of employment." Mich. Const. Art. 4, §§ 48, 49. Based in part on these constitutional provisions, the Legislature has allowed public employees to engage in collective bargaining, but at the same time has preserved the State's power to negate or revise collectively bargained agreements. Thus, the law of Michigan provides that the terms of any collective bargaining agreement are considered to be preempted or superseded by contrary statutes or administrative regulations issued by state agencies. *See, e.g., Detroit Police Officers Ass'n v. City of Detroit*, 391 Mich. 44, 66, 214 N.W.2d 803, 814 (1974) (the bargaining law "contemplates open negotiations between the parties unless controlled by a specific state law").[29] This interplay between state laws and collective bargaining agreements is incorporated into most labor contracts in Michigan, including the 1981-84 agreement between FFA and Ferris State College. *See* Def. Ex. I, §§ 1.5(A) & 4.1(B) (the agreement is effective "only to the extent [that its] specific and express terms are in conformance with the constitution and laws of the State of Michigan," and that any provision "will be deemed amended to the extent necessary to comply with . . . any decision of any . . . court or administrative body of competent jurisdiction").

There exist, moreover, a myriad of statutes and regulations that directly affect the terms of public employment in Michigan. With regard to all educational employees, for example, the Legislature has exercised direct

[29] *See also City of Grand Rapids v. FOP*, 415 Mich. 628, 637-38 n.6, 330 N.W.2d 52, 55 n.6 (1982) (rights of individual employees established by state and federal statutes may not be bargained away); *cf. Pontiac Police Officers Ass'n v. City of Pontiac*, 397 Mich. 674, 684, 246 N.W.2d 831, 836 (1976) (it is the "prerogative of the Legislature" to change the scope of bargaining).

control over retirement and pensions, Mich. Comp. Laws §§ 38.381-.388, 38.1301-.1407; wages and fringe benefits, *id.* §§ 408.381-.398, 408.471-.490; disability compensation, *id.* §§ 418.101-.941; occupational safety and health, *id.* §§ 408.1001-.1094; unemployment compensation, *id.* §§ 421.1-.67a; reemployment rights for veterans, *id.* §§ 32.271-.274; and access to personnel files, *id.* §§ 423.501-.512. With regard to public school teachers specifically, the Legislature has enacted statutes governing, *inter alia*, tenure, including the terms of probation, discharge, demotion, resignation, and leaves of absence, *id.* §§ 38.71-.191; sabbatical leaves, *id.* § 380.1235; holidays, *id.* § 380.1175; licensing and certification, *id.* § 380.1531; the length of the school year, *id.* § 380.1284; and the terms of employment upon consolidation of school districts, *id.* § 380.902a. These and other statutes, most of which deal with matters that traditionally are considered mandatory subjects of collective bargaining, either displace bargaining completely or set standards that establish a baseline for supplementary bargaining.[30]

Retirement benefits for public employees provides a particularly pertinent example of the interplay between state laws and collective bargaining because a large portion of the lobbying activity held chargeable by the courts below concerned this matter. *See supra* note 26. In Michigan, basic retirement benefits for public employees are established by statute, and educational employees are covered by either the Public School Employees Retirement Act, Mich. Comp. Laws §§ 38.1301-.1407, or the Optional Retirement Act, *id.* §§ 38.381-.388, the latter of which allows faculty and administrators at institutions of higher education, including Ferris State College, to choose between the retirement system for public school employ-

[30] With regard to this point generally, *see, e.g.*, Summers, 44 Cin. L. Rev. at 671 (discussing promotion policies fixed by civil service code); H. Wellington & R. Winter, *The Union and the Cities* 137-53 (1971) (discussing class size, student discipline, and curricular reform); H. Wellington, *Labor and the Legal Process* 247, 263 (1968) (discussing minimum wages, social security, unemployment and worker's compensation, and full crew laws).

ees and a privately-administered pension plan. The retirement system for public school employees is administered by a Public School Employees Retirement Board, which has the authority to promulgate rules to implement the statute. *See id.* §§ 38.1322, .1325. The statutory and regulatory provisions governing retirement benefits, whether adopted by the Legislature itself or by the Retirement Board in the exercise of its delegated powers, are incorporated into the collective bargaining agreements negotiated by virtually every affiliate of MEA, including the agreement between FFA and Ferris State College. *See* Def. Ex. I, § 15 (requiring members of FFA to "elect to participate in either the (1) Michigan Public School Employees' Retirement Fund, or (2) Optional Retirement Program," and providing that the amount of employer contributions to the optional plan is "the same amount" as required by the state statute, unless that amount dips below ten percent of salary, in which case the bargaining agreement controls). Thus, to enhance, or to prevent the erosion of, collectively bargained retirement benefits for the employees that it represents, FFA and/or its affiliated parent organizations of necessity must lobby the Legislature and the Retirement Board.

Nor is Michigan's treatment of retirement benefits unique. Virtually all terms and conditions of public employment in Michigan are negotiated at the bargaining table, but the agreements reached are, *at all times*, subject to invalidation, revision, or supplementation by state legislative and executive decisionmakers. Because the content of collective bargaining agreements is so inextricably intertwined with statutory and regulatory developments—indeed, from the perspective of a public-employee union, state statutes and regulations serve as a direct substitute for agreements reached at the bargaining table—it hardly can be denied that lobbying by public-sector unions in Michigan on specific terms and conditions of employment is "germane" to collective bargaining.

Second, the courts below also held that lobbying by FFA, MEA, and NEA to increase funding for public education is chargeable to petitioners. Referring to this Court's observation in *Abood* that "budgetary and appropriations decisions could be regarded as an 'integral part of the bargaining process' for public employees," PA 5a (quoting 431 U.S. at 236), the Court of Appeals held that government decisions on such financial matters "directly affect the terms and conditions of employment for public employees," PA 7a, and therefore that "securing funding for public education in Michigan . . . is directly related to the duties of an exclusive bargaining representative," PA 8a. As the District Court put it, lobbying to increase funding is "really the front line bargaining of [the unions'] contracts," because "if [the unions] have no way of raising that money, which is all allocated through the legislative process or an election, then [they] have no way to bargain." PA 31a.

These holding are clearly correct. Unlike collective bargaining in the private sector, where employers generally have the authority to make financial commitments and to carry them out, wages and other monetary benefits for public employees are dependent upon tax rates and governmental budgets, and it often is not "legally possible or politically sensible" for individual public employers to make final determinations regarding these subjects at the bargaining table. Summers, 44 U. Cin. L. Rev. at 670. *See* Summers, *Bargaining in the Government's Business: Principles and Politics*, 18 Toledo L. Rev. 265, 266 (1987) ("employer representatives at the bargaining table have limited authority to make binding agreements because wage increases or benefits are dependent on the budget, which is dependent on taxes, and these are matters for the legislative body, not the negotiators"). Because the public employer "must gain the consent of higher levels of political authority,"[31] or be-

[31] J. Dunlop & N. Chamberlain, *Frontiers of Collective Bargaining* 127 (1967); *see* E. Beal & J. Begin, *The Practice of Collective Bargaining* 465 (6th ed. 1982); Project, *Collective Bargaining*

cause the employer "depends on some other source such as state aid for its revenues," [32] it is incumbent upon the bargaining representative to engage in various forms of lobbying in order to persuade the relevant agencies of government to appropriate sufficient funds to implement the contractual arrangements that have been, or will be, bargained.[33]

Indeed, the Court in *Abood* acknowledged the necessity of such lobbying when it noted the importance to the public-sector bargaining process of "related budgetary and appropriations decisions." 431 U.S. at 236. Although petitioners attempt to limit this statement to "lobbying the employees' public employer to budget and appropriate funds necessary to pay salaries and benefits set out in the contract," P. Br. at 28, there is no logical reason to distinguish lobbying of government officals who actually control the finances of the public employer from lobbying the public employer itself.[34] In this case, for example, it is undisputed that the nominal "public employer"—*i.e.*, the Board of Control of Ferris State College—obtains virtually all of its funding from state appropriations that are directly earmarked for Ferris State College, *see* 1989 Mich. Pub. Act 195; PA 93, and that a large portion of these appropriations is used to fund salaries and benefits for employees of the college, including

and Politics in Public Employment, 19 U.C.L.A. L. Rev. 887, 923 (1972).

[32] M. Lieberman, *Public Sector Bargaining* 71 (1980).

[33] It is this direct fiscal dependence of most public employers that renders inapt comparisons to lobbying by private-sector unions designed simply "to increase a private employer's income." Brief *Amicus Curiae* of the Public Service Research Council, Inc. at 13 n.24.

[34] Nor is there any principled reason to distinguish between lobbying that takes place *after* collective bargaining has been completed to secure the funds necessary to implement salaries and benefits that have been contingently agreed upon, and lobbying that seeks prior to or during collective bargaining to secure sufficient funds to enable a public employer to make unconditional financial commitments in the first instance.

the collectively bargained salaries and benefits of the employees in the FFA bargaining unit. In these circumstances, lobbying to increase funding for Ferris State College might well be considered "an integral part of the bargaining process." 431 U.S. at 236. At the very least, however, these factors demonstrate that the District Court was correct when it concluded that, "[i]n a public sector bargaining unit where funding for employment positions, salaries and benefits is conditioned upon legislative appropriations, such lobbying is directly related to the statutory duties of the exclusive representative." PA 58a.[35]

Third, because petitioners have so thoroughly distorted the record in this case, it bears repeating that the unions are not contending that petitioners may be charged for the costs of lobbying on policy issues of general public concern that are not related, or are related only incidentally, to collective bargaining. As Justice Douglas noted in his concurring opinion in *Street*:

> If [compelled] dues are used . . . to promote or oppose birth control, to repeal or increase the taxes on cosmetics, to promote or oppose the admission of Red China into the United Nations, and the like, then

[35] Noting that "[n]one of the state and federal monies Ferris receives are earmarked for salaries and benefits," petitioners argue that lobbying for increased funding is not related to collective bargaining because the connection between such funding and increased salaries and benefits is "not even necessary." P. Br. at 29. If by this statement petitioners are suggesting that increases in funding do not *necessarily* result in increases in salary, they are stating a truism that is of no moment to this case, since even those activities that are indisputably germane to collective bargaining do not *necessarily* result in contractual improvements. If, on the other hand, petitioners are suggesting that increased state or federal funding for Ferris State College is not *necessary* to increases in salaries and other economic benefits, then petitioners are simply wrong. Both the record in this case, *see, e.g.*, JA 34-35, and the practical realities of collective bargaining in the public sector, confirm that improvements in salaries and other economic benefits *cannot occur* without increases in funding from the appropriate public authorities.

> the group compels an individual to support with his money causes beyond what gave rise to the need for group action. [367 U.S. at 777.]

For this reason, the unions conceded at trial that they could not charge petitioners for the costs of lobbying with regard to various matters, including, *inter alia*, tuition tax credits, voluntary prayer in the schools, the teaching of creationism, juvenile justice, the Equal Rights Amendment, extension of the Voting Rights Act, the rights of Native Americans, a nuclear weapons freeze, redistricting and reapportionment, capital punishment, abortion, and gun control, *see* JA 204, 208, 213, 214, 216, Trial Testimony of Elizabeth Baker at 594-96, and the District Court deemed all of this lobbying to be nonchargeable when it analyzed the contents of the *Teacher's Voice*.[36] In contrast to these lobbying activities, however, the matters on which lobbying was held chargeable by the courts below—*i.e.*, lobbying with regard to specific terms and conditions of employment, such as retirement, and lobbying in support of increased funding for public education—are directly related to collective bargaining by the unions in this case.

3. Once it is established that the lobbying activities held chargeable by the courts below are "germane to collective bargaining," *Ellis*, 466 U.S. at 456, the remaining question is whether those activities involve additional interference with the First Amendment interests of objecting employees beyond that already countenanced by allowance of the agency shop itself, and if so, whether

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[36] As the Court of Appeals noted, PA 10a n.1, the District Court "may have erred in permitting [petitioners] to be charged for a few particular articles," such as those involving "utility rates and a nuclear weapons freeze." The appellate court nonetheless refused to reverse on the basis of "allegations of essentially *de minimus* error," because it believed that the District Court had "correctly interpreted and applied the law," and did not consider it appropriate for a reviewing court to analyze "each and every union expenditure, no matter how minor, for conformity with the law."

that interference is adequately supported by the asserted governmental interest, *id.*

Like the union publications and conventions that were at issue in *Ellis*, lobbying is a communicative activity and involves the expression of ideas, but also like union publications and conventions, the lobbying held chargeable by the courts below results in "little additional infringement of First Amendment rights beyond that already accepted, and none that is not justified by the governmental interests behind the union shop itself." *Id.*

The subject matter of the lobbying by the unions in this case—*i.e.*, specific terms and conditions of employment, such as retirement, and increased funding for the public employer—are the "nuts and bolts" issues that face unions representing public employees. Whether these issues are discussed and decided at the bargaining table, or whether they are the focus of proposed legislation and regulation by the government, the subject matter—and accordingly the degree of infringement of First Amendment rights—remains the same.[37] What petitioners are in effect arguing, therefore, is that lobbying should be considered constitutionally nonchargeable "political activity"[38] solely because of the *forum* in which

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[37] Indeed, because collective bargaining in the public sector directly impacts the decisionmaking process of the government representatives who sit on the other side of the bargaining table, it could be argued that the First Amendment interests of objecting employees are subject to *less* impairment when their fees are used to finance the lobbying at issue here than when they are used to support collective bargaining. With regard to lobbying, not only is the impact on governmental decisionmaking less direct, but the objecting employees at least retain their freedom to criticize or disavow their bargaining representative's position in the same legislative or administrative forum in which the union is speaking. *See Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976).

[38] Nor does it advance petitioners' argument to label lobbying as "political activity"; the Court in *Abood* recognized that collective bargaining in the public sector is "inherently 'political,'" 431 U.S. at 227, and stated that "[n]othing in the First Amendment or our cases discussing its meaning makes the question whether

it takes place—*i.e.*, in the "political arena[]." P. Br. at 26, 27, 29. But the Court has made clear that, for purposes of determining chargeability, the forum in which a challenged activity takes place is not controlling, inasmuch as *Abood* indicated that lobbying to ratify and provide funding for collective bargaining agreements might be constitutionally chargeable, 431 U.S. at 236, and *Keller* held that objecting members of a mandatory bar could be charged for those bar activities that are related to regulation of the profession, including recommendations with regard to "admission to practice, the disciplining of lawyers, codes of conduct, and the like," regardless of whether those recommendations are made "to the courts or the legislature." 110 S. Ct. at 2235.

But even if there were some additional infringement of First Amendment rights caused by lobbying, the dispositive question for constitutional purposes would be whether lobbying on matters that have a direct bearing on collective bargaining is sufficiently related to the the asserted state interest in promoting "peace[ful] and stabilized labor-management relations" to overcome that additional infringement. The State of Michigan has determined that it is, and nothing in the First Amendment prohibits the State of Michigan from implementing this judgment.

In sum, the First Amendment allows unions to compel objecting employees to financially support lobbying on matters that are germane to collective bargaining—*i.e.*, so long as the lobbying is undertaken "to promote the cause which justified bringing the group together." *Abood*, 431 U.S. at 23. Based on this standard, the courts below correctly held that lobbying on specific terms and conditions of employment, and lobbying to increase funding for public education, are constitutionally chargeable activities.

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the adjective 'political' can properly be attached to [union activities] the critical constitutional inquiry," *id.* at 232.

B. Millage Votes And Other Ballot Issues

Petitioners challenge the chargeability of union activities in support of millages and other ballot issues designed to increase the level of funding for public education, including the cost of the PPE Conference, which the District Court found chargeable as an expenditure to "pass millages, fight ballot issues, and do the kind of things that are absolutely necessary to fund public education," JA 31a, and the cost of certain articles in the *Teacher's Voice* that described similar activities of MEA, PA 80a.[39] The issue presented by this particular challenge is not, as one might suppose from reading petitioners' brief, whether objecting employees may be charged for union activity undertaken in connection with all ballot issues, or even with all millages that might increase funding for public agencies generally. The issue is, rather, whether they may be charged for those activities in support of millages or ballot issues directly affecting the level of funding available for educational employers.[40] And on this issue, the determinative ques-

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[39] With regard to the PPE Conference, petitioners selectively cite record documents to dispute the District Court's finding, affirmed by the Court of Appeals, that this Conference was directed at securing funding for public education in Michigan, PA 31a, and allege that the Conference had other "political" or "legislative" purposes, P. Br. at 32. With regard to the articles in the *Teacher's Voice*, petitioners speculate as to which of the articles that they categorized as "Electoral Politics," *supra* note 5, were considered chargeable by the District Court, and then allege that the courts below erroneously concluded that these articles concerned funding for public education. In neither case, however, have petitioners demonstrated that the factual findings of the District Court are clearly erroneous, or that any errors by the courts below are of constitutional significance. *Cf. Hudson*, 475 U.S. at 307 n.18 ("[a]bsolute precision in the calculation of the charge to nonmembers cannot be expected or required") (citation omitted).

[40] For this reason, petitioners assertion that union support for general "[t]axation" is more akin to "the election of pro-labor political candidates" than to a "budgetary [or] appropriations decision that might be seen as an integral part of the bargaining

tion is whether support for such millages and ballot issues is sufficiently related to collective bargaining to advance the state's interest in preserving labor peace and stabilizing labor relations in the public sector. For reasons already explained above, *supra* at 35-37, increasing the funding available for public education and bargaining collectively for educational employees are so intertwined that the former clearly is germane to the latter. Again, the only difference between union activities in support of this defined category of millages and ballot issues that is closely connected to collective bargaining and other clearly chargeable union activities is the forum in which the activity takes place. And, as previously indicated, *supra* at 39-40, this difference in forum is not constitutionally determinative in the present context. In short, because these "electoral" activities of the unions were designed to increase funding for public education, expenditures for those activities should be chargeable to objecting employees.

C. "Public Relations" Activities

Two expenditures that petitioners characterize as "public relations" activities were held chargeable and are at issue here: monies expended by FFA during negotia-

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process," P. Br. at 33 (citations omitted), is beside the point. The courts below did not hold that activities by the unions to support general "taxation" are chargeable to petitioners; rather, their rulings were limited to "millage and ballot campaigns *necessary to fund public education*" because, as the Court of Appeals put it, "the terms and conditions of employment for the public sector employees represented by the unions in this case are obviously closely connected to the funding provided to public education," PA 9a (emphasis in original).

Nor are petitioners correct when they assert that "taxation relates only indirectly and contingently to bargaining." P. Br. at 33. Millages in Michigan are used to provide direct funding for local school districts, intermediate school districts, or community college districts, and the public school code expressly provides that money raised by these millages "shall not be used for a purpose other than that for which it was raised without the consent of a majority of the school electors," Mich. Comp. Laws § 380.1216. *See also supra* note 35.

tions with Ferris State College for "informational picketing, media exposure, signs, posters and buttons," PA 30a, 59a, and the costs of various articles published in the *Teacher's Voice* concerning efforts to galvanize community support for the unions and for public education in general, PA 80a; JA 227-29.

In the context of public-sector bargaining, where "the employer is the public—in ultimate political terms, the voters to whom the public officials are responsible," Summers, 83 Yale L.J. at 1159, unions frequently are forced to "go public" in an effort to develop community support that will, in turn, generate constituent pressure on public employers. Indeed, such employers may modify intransigent positions at the bargaining table if the "costs of disagreement" in terms of voter opposition become too high. *See* J. Dunlop & N. Chamberlain at 150-52. As this Court stated in *Abood*:

> Whether [government representatives who sit at the other side of the bargaining table] accede to a union's demands will depend upon a blend of political ingredients, including community sentiment about unionism generally and the involved union in particular, the degree of taxpayer resistance, and the views of voters as to the importance of the service involved and the relation between the demands and the quality of service. [431 U.S. at 228.] [41]

Because these public relations activities are undertaken in an effort to persuade employers to alter their bargaining positions, and to accede to union demands, they serve as the functional equivalent of the economic strike in the private sector and, as such, clearly should be chargeable to objecting employees.

The expenses incurred by FFA during negotiations for "informational picketing, media exposure, signs, posters and buttons" were, as the District Court observed, "ex-

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[41] *See also Bridgeport-Spaulding*, 1986 MERC Op. at 1066 ("[t]o be effective, a teachers' representative must keep the public informed of issues such as millages or the status of contract negotiations," and therefore "public relations activities, like conventions and social activities, are a standard feature of union operations").

penditures for disbursing information to the public that [is] favorable to the bargaining unit's position," PA 59a, which is "very important during contract negotiations involving public sector labor unions such as the FFA," PA at 30a. The expenses incurred by MEA for publishing articles to "enhance the reputation of the teaching profession," PA 12a, although less directly tied to an ongoing dispute in negotiations, also were designed to assist the unions in obtaining community support for their positions at the bargaining table.[42] Accordingly, the courts below were correct when they held that these expenditures are chargeable to petitioners.

D. Professional Activities

Again focusing on the *Teacher's Voice*, petitioners contend that the column inches categorized as "Other Material" impermissibly were held chargeable by the courts below, PA 80a, because they include articles about "teaching and education generally, professional development, unemployment, job opportunities, award programs of the MEA, and other miscellaneous matters," P. Br. at 36.[43] But these professional activities are designed to improve the instructional methods and other professional skills of employees represented by the unions, and as such they are closely related to an aspect of employment that has been held to be a mandatory subject of bargaining under Michigan law. *See CMU Faculty Ass'n v. Central Michigan University*, 404 Mich. 268, 273 N.W.2d 21 (1978) (programs concerned with "teaching effectiveness," including "the elements, procedures and criteria involving evaluations for purposes of reappointment, retention and promotion" are mandatory subjects of bargaining).[44]

In addition, these professional activities are designed to eliminate employer-employee friction and to create harmonious working relationships among represented employees. The Court of Appeals analogized these expenditures to the union social activities held chargeable in *Ellis*, and concluded that "professional/educational expenditures intended to improve the profession generally and the skills of teachers specifically are . . . sufficiently related to the unions' duty to represent bargaining unit employees effectively so as to be chargeable to dissenters." PA 12a. This ruling should be affirmed.[45]

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[42] Petitioners cite *Beck v. Communications Workers*, 776 F.2d 1187, 1211 n.32 (4th Cir. 1985), *aff'd on other grounds*, 800 F.2d 1280 (4th Cir. 1986) (en banc), *aff'd on other grounds*, 487 U.S. 735 (1988), for the proposition that "creating a favorable climate of public sympathy and support for a union is 'not "reasonably necessary . . . for the proper effectuation" of collective bargaining,' " P. Br. at 36, but that case lends no support to their position. Quite apart from the dispositive fact that *Beck* involved a private-sector union, the expenditures for "community services" that were found nonchargeable in that case did not involve public relations on bargaining, employment, or union image, as in this case. The *Beck* expenditures were for contributions to particular charities, *see* 776 F.2d at 1211, and the unions here have conceded that their charitable contributions are not chargeable.

Equally unconvincing is petitioners' attempt to analogize the public relations activities at issue in this case with the organizing expenditures at issue in *Ellis*. *See* P. Br. at 36. The Court in *Ellis* held organizing costs to be nonchargeable under the RLA because such expenditures are aimed at the "expansion" or growth of unions, and "afford only the most attenuated benefits to collective bargaining." 466 U.S. at 451-52. The public relations activities at issue here, in contrast, are specifically designed to enhance the bargaining effectiveness of the public-sector unions involved in this case.

[43] Petitioners subsequently acknowledge that the unions treated the MEA awards program as nonchargeable. *See* P. Br. at 37 n.28 (citing JA 21).

[44] *See also Bridgeport-Spaulding*, 2986 MERC Op. at 1064 ("assistance to teachers in advancement of their employment opportunities" is an activity "normally and reasonably conducted by an exclusive bargaining agent" and therefore is chargeable to objecting employees).

Nor is it relevant that similar professional activities "were conducted by teacher associations before public-sector bargaining became lawful." P. Br. at 36. The same could be said for many union activities, including conventions, publications, and social activities, that clearly are related to collective bargaining and chargeable to objecting employees.

[45] Petitioners try to defeat the analogy to union social activities by arguing, without citation to any particular articles in the

E. The MEA and NEA Conventions, And The 13E Coordinating Council

The courts below upheld the chargeability of expenditures for the MEA and NEA Conventions, reasoning that "[b]oth are clearly chargeable to [petitioners] under *Ellis*." PA 6a, 57a, 63a. Applying "the same rationale," PA 58a, the lower courts also approved the chargeability of FFA's sending delegates to the 13E Coordinating Council, a forum that "developed bargaining strategies and representational policies for bargaining units, including Ferris State College," PA 6a, 58a. Although these holdings would seem unimpeachable in light of *Ellis*, where the Court "ha[d] very little trouble in holding that petitioners must help defray the costs of [national union] conventions," 466 U.S. at 448, petitioners continue to challenge these expenditures.

First, petitioners contend that Ellis is not controlling in this case because the national union in *Ellis* was formally recognized as the bargaining representative, whereas "[t]he NEA, MEA and 13E Coordinating Council are not the exclusive representative at Ferris." P. Br. at 38.[46] But, as the Court of Appeals noted, this "distinction amounts to [no] more than a technical difference in union organization." PA 6a. Although, in *Ellis*, the national parent organization was officially named as the bargaining representative, this does not alter the fact that the convention at issue in *Ellis* was "a national convention at which the members elect [national] officers, establish [national] bargaining goals and priorities, and formulate overall [national] union policy." 466 U.S. at 448. In short, the structural relationship of the national convention in *Ellis* to the Western Airlines bargaining unit was identical to that of the MEA and NEA Conventions and the 13E Coordinating Council to the FFA bargaining unit. Moreover, it hardly would seem appropriate to have the constitutional rights of objecting employees turn on whether a union, for a variety of organizational reasons having little if anything to do with collective bargaining, followed the practice of having the local union, the national union, or both, officially named as the bargaining representative.

Second, petitioners assert that the MEA and NEA Conventions and the 13E Coordinating Council served "*primarily* political and ideological purposes," P. Br. at 38 (emphasis in original). Although this assertion simply disregards the record in this case,[47] for present purposes it is sufficient to note that the Court in *Ellis* concluded that BRAC could charge for the entire cost of national conventions under the First Amendment even though such conventions "afford opportunities—that often

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Teacher's Voice, that some of the professional activities found chargeable by the courts below "are ideological in nature" because they concern "curriculum and instructional methods." P. Br. at 37. Even if deemed "ideological," however, activities related to these matters would be chargeable because curriculum and instructional methods are common subjects of bargaining for unions that represent educational employees in Michigan. *See, e.g.*, Def. Ex. I, § 3.5 (governing "adoption of new educational policies" and "[p]roposed changes in and additions to institutional policy affecting faculty"), § 6.2(B) (faculty "are entitled to academic freedom in the classroom in discussing their assigned subjects and disciplines"); § 6.2(E) (faculty "are primarily responsible for decisions regarding the instruction of students, in accordance with departmental procedures"). *Cf. Abood*, 431 U.S. at 222 (collective bargaining regarding matters such as abortion and racial discrimination, although clearly relating to "the advancement of ideas," is chargeable).

[46] Petitioners' argument is defective on its own terms. The courts below expressly recognized that, as a matter of state law, "the 'union as affiliated is the exclusive representative,'" *see supra* note 15, and therefore FFA serves as the official bargaining representative for the employees at Ferris State College as a local affiliate of both MEA and NEA.

[47] As noted above, the courts below expressly found that the 13E Coordinating Council "developed bargaining strategies and representational policies for bargaining units, including Ferris State College," PA 6a, and applied "the same rationale" when holding the costs associated with the MEA and NEA Conventions "fully chargeable" to petitioners, PA 57a-58a. Petitioners have selected excerpts from the record in this case in an effort to show that these findings are clearly erroneous, but there is ample support for them in the record, *see, e.g.*, JA 142-43; Trial Testimony of Warren Culver at 197-99; Def. Ex. GGGG at 49-50.

are fully exploited—to further political objectives." 466 U.S. at 459 (Powell, J., dissenting in part) (noting the "major participation of politicians" at the BRAC convention). The holding in *Ellis* that periodic conventions are "normal events" that are "essential to the union's discharge of its duties as bargaining agent" is dispositive here.[48]

F. So-Called "Strike Preparation" Activities

Although public employee strikes are unlawful in Michigan, FFA attempted during collective bargaining "to put pressure on the employer by making outward preparations for a possible strike," including establishment of a "crisis center." PA 20a-30a. Because FFA did not actually engage in a strike,[49] the courts below held that these expenditures fall "within the range of reasonable bargaining tools available to a public sector union during contract negotiations," and are chargeable to petitioners. PA 11a, 59a.[50]

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[48] Petitioners note that the convention in *Ellis* "met only once in four years," and assert that this "is a far cry" from the "*three* conventions and several other meetings held every year" by NEA, MEA, and the 13E Coordinating Council. P. Br. at 38 (emphasis in original). But with this argument petitioners are simply quarreling with the "strategy" that the unions' leadership has decided upon in order to further the collective interests of the employees that they represent.

[49] This fact was "of paramount importance" to the District Court, PA 59a, which found that a $2500 no-interest loan made by FFA to support another bargaining unit that did engage in an illegal strike, PA 59a, and articles in the *Teacher's Voice* that reported on illegal strikes, PA 80a, were not chargeable to petitioners.

[50] In large part, this holding was based on the testimony of the Director of MEA's UniServ Division, particularly his statement that in "only one out of every seven or eight" situations in which strike preparations are made does a strike actually occur. PA 29a. Petitioners suggest that this testimony "should have been disregarded, because it was contradicted by contemporaneous union records" showing that that FFA "intended to strike." P. Br. at 41. But this argument reflects a total failure on petitioners' part to grasp the realities of public-sector bargaining. In order for strike preparations to put pressure on a public employer, the threat must be credible. That hardly would be the case if, while FFA was taking the necessary preparatory actions, FFA also was advising the public that these preparations were only a bargaining ploy.

Petitioners claim that objecting employees "cannot constitutionally be compelled to finance threats to engage in an illegal activity, even as a pressure tactic in bargaining." P. Br. at 41. But the State of Michigan has never declared that it is unlawful, or even contrary to public policy, for a union to threaten an illegal strike. Nor has there been any showing that allowing unions in Michigan to threaten strikes makes it more likely that there will be illegal strikes. To the contrary, by placing pressure on the employer to reach an agreement, the threat of a strike may make it *less* likely that a strike will occur.

In any event, even accepting petitioners' assertion that the activities of FFA to "pla[n] and threate[n] . . . illegal acts," P. Br. at 42, are nonchargeable, the courts below specifically found that the money spent by FFA on so-called "strike preparation" activities—including money expended for rent, insurance, utilities, telephone, equipment, and petty cash in connection with the "crisis center," PA 78a-79a—served other purposes that were plainly chargeable. Thus, the "crisis center . . . serv[d] as a meeting place for the local's membership [and] a base from which tactical activities such as informational picketing can be conducted." PA 30a. This finding, when combined with the lawful goal of putting pressure on the employer to reach an agreement at the bargaining table, amply justifies the conclusion that FFA constitutionally may charge petitioners for these activities.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAMES P. LEHNERT, *et al.*,
Petitioners,

v.

THE FERRIS FACULTY
ASSOCIATION-MEA-NEA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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I. AGENCY SHOPS ARE NOT EXCEPTED FROM STRICT FIRST-AMENDMENT SCRUTINY

Respondent unions cannot deny that Michigan's requirement that petitioner nonunion employees pay a fee to them as a condition of public employment—even for collective bargaining, contract administration, and grievance adjustment on behalf of their own bargaining unit—is "a significant impingement on First Amendment rights." *Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984); *accord Teachers Local 1 v. Hudson*, 475 U.S. 292, 301 n.8, 307 n.20 (1986). Rather, the unions argue that this Court permits less than first-amendment strict scrutiny, and should defer to Michigan's judgment, in defining what may constitutionally be charged to objecting nonmembers. No such exception to the traditional rule exists.

The "agency shop" inherently coerces association and speech. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222, 233-35 (1977). State action which compels speech is "content-based regulation," "subject to exacting First Amendment scrutiny" (if the speech is not purely commercial), because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 795-98 (1988) (citing, *inter alia*, *Abood*, 431 U.S. at 234-35).

Consequently, when *Abood* addressed what activities nonmembers constitutionally may be compelled to subsidize, it gave *no* deference to Michigan's judgment, expressed in the very statute at issue here, that it served a valid state interest for public-sector exclusive bargaining agents to exact service fees "for legislative lobbying and in support of political candidates," 431 U.S. at 215. The Court recognized that there may be a connection between those activities and public-sector collective bargaining. *See id.* at 228. However, it *rejected* that connection as a basis for coercing speech. Relying on strict-scrutiny cases, *Abood* held that the first amendment prohibits a union's expenditure of dissenting nonmembers' fees "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative." *Id.* at 232-36.

The adjective "germane" does not suggest "'that compelling an employee to finance any union activity that may be "related" *in some way* to collective bargaining is permissible under the First Amendment * * * ,'" Respondents' Brief at 15 n.8 (quoting *Abood*, 431 U.S. at 254 (Powell, J., concurring in the judgment)) (emphasis added). Rather, it indicates that the only activities protected by the first amendment which may constitutionally be charged to nonmembers are those which relate *directly* to the union's duties as their bargaining agent, since "germane" means "closely related." *Webster's New Twentieth Century Dictionary* 767 (2d ed. unabr. 1978); *accord Black's Law Dictionary* 816 (rev. 4th ed. 1968). That reading is reinforced by the *dictum* that "related budgetary and appropriations decisions might be seen as an integral part of the bargaining process," *Abood*, 431 U.S. at 236. To be "integral," a thing must be "necessary to make a whole." *Webster's*, *supra*, at 953.

Respondents seize on the comment in *Ellis*, 466 U.S. at 456, that the union must "have a certain flexibility in its use of compelled funds." However, *Ellis* limited that "flexibility" to activities necessarily or reasonably related to performance of the union's duties as the dissenters' bargaining agent *and* involving no or "little additional infringement of First Amendment rights beyond that already accepted" in coerced subsidization of direct costs of those duties. *See id.* at 448-51, 456; Petitioners' Brief at 9-10.

Ellis extended no "flexibility" to publications reporting on nonchargeable activities, to litigation not directly concerning the objectors' unit, or to organizing. The Court accepted the court of appeals' finding that those activities "ultimately benefited the union's collective-bargaining efforts," 466 U.S. at 441. Yet, it held them nonchargeable on statutory grounds, explaining as to organizing that such a connection to bargaining in the dissenters' unit was too "attenuated." *Id.* at 450-53. As the Brief for Amicus AFL-CIO at 29 n.19 concedes as to litigation and organizing, the result should be the same under the first amendment. Activities "with some relationship to collective bargaining" that also "implicate heightened First Amendment interests, separate from those involved in requiring support of union activity germane to collective bargaining," are "held to a stricter First Amendment standard than where the objection is simply

that it is a *union* expense." *Id.*; *see Ellis*, 466 U.S. at 461-62 (Powell, J., concurring in part). In short, *Ellis* applied exacting scrutiny to activities such as those at issue here.[1]

Respondents' Brief at 13 infers that strict scrutiny is unnecessary because *Keller v. State Bar*, 110 S. Ct. 2228, 2237 (1990), said that compulsory bar dues may not be spent on "activities having political or ideological coloration which are not reasonably related to the advancement" of "the regulation of the legal profession." *Keller* also described constitutionally chargeable activities as those "germane to," or in which the Bar is "acting essentially as professional advisors to those ultimately charged with," that regulatory function. *Id.* at 2236-37. It thus defined "reasonably related" as a *direct* relationship.[2]

Moreover, *Keller* established that the state interest to which chargeable expenses must relate is not what a state broadly

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[1] Respondents' Brief at 8 n.6 errs in asserting that only contributions to candidates are subject to strict scrutiny. The principle that governmental "'restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment' * * * applies equally to 'the discussion of political policy generally or advocacy of the passage or defeat of legislation.'" *Meyer v. Grant*, 486 U.S. 414, 428 (1988) (quoting *Buckley v. Valeo*, 424 U.S. 1, 48, 50 (1976)).

[2] The Court usually excepts a class of regulation from first-amendment strict scrutiny only explicitly, as it did in *Board of Trustees v. Fox*, 109 S. Ct. 3028, 3032-35 (1989) (commercial speech), cited by the AFL-CIO's Brief at 25. This case is in none of the classes described in *Fox*: the protected aspects of the speech here are inextricable from any commercial aspects; the issue is the content of the speech, not its time, place or manner; and what is compelled is speech, not mere expressive conduct. However, it is worth noting that *Fox*, 109 S. Ct. at 3035, held that the "reasonable fit" required of an infringement on speech not subject to the least-restrictive-means test is not merely that it "could be thought to further a legitimate governmental goal," but that it is "narrowly tailored to achieve" a "substantial" state goal. That the procedural safeguards in collecting service fees imposed on unions by *Hudson*, 475 U.S. at 303, are only "carefully tailored," not the most rigorous conceivable, does not prove that strict scrutiny is unnecessary here, as Respondents' Brief at 15 n.8 argues. Procedural requirements are similar to time, place, and manner regulations, but the definition of the subjects on which speech may be compelled is a *content*-based regulation. *See Riley*, 487 U.S. at 795.

asserts it to be, but the narrow interest which *this Court* identifies as sufficient to justify a compulsory fee. *See id.* at 2236. The basic flaw in the unions' argument is that, like the decisions below, it fails to recognize the limits to the governmental interests which the Court has found support the agency shop.

II. THE GOVERNMENTAL INTERESTS IN AN AGENCY SHOP IDENTIFIED BY THE COURT CONCERN THE STATUTORY BARGAINING PROCESS IN A SPECIFIC UNIT, NOT LABOR RELATIONS GENERALLY

The unions assume that the governmental interests underlying a constitutional agency shop are "labor peace" in the abstract and elimination of "free riders" on everything unions do to affect employment conditions anywhere. The only interests ever accepted by this Court, however, are much narrower.

The "desirability of labor peace" which *Abood*, 431 U.S. at 224-25, found "support[s] the impingement upon associational freedom created by the agency shop" was for "labor peace" *in making and enforcing a labor contract in a specific bargaining unit*:

> The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.

Id. at 220-21; *accord id.* at 224. That language does not refer to the multi-unit scheme that the unions posit.

The "free-rider problem" this Court recognized is no less limited. The "essential justification for authorizing the union shop was the desire to eliminate free riders—employees *in the bargaining unit* on whose behalf the union was *obliged* to perform its *statutory functions*, but who refused to contribute to the cost *thereof*." *Ellis*, 466 U.S. at 447 (emphasis added); *accord Keller*,

110 S. Ct. at 2235. Those functions are not "self-generated," as Respondents' Brief at 12 n.7 pretends. They are imposed by the statute which grants the union its status as exclusive representative, explicitly as to "the mutual obligation of the employer and the representative of the employees" to engage in collective bargaining, contract administration, and grievance adjustment, Mich. Comp. Laws § 423.215 (1979) (P.A. 93a), and implicitly as to the duty of fair representation in that process, *Goolsby v. City of Detroit*, 419 Mich. 651, 660 & n.5, 358 N.W.2d 856, 861 & n.5 (1984). *See Abood*, 431 U.S. at 221-22. In short, the "free rider" rationale applies only to the statutorily-defined process which a nonmember has a legally enforceable right to have his bargaining agent perform on his behalf.

III. CHARGING FOR SERVICES ON A STATE AND NATIONAL BASIS IS NOT A NARROWLY TAILORED MEANS OF SUBSIDIZING A STATUTORY SCHEME OF BARGAINING SEPARATELY WITHIN SINGLE UNITS

The unions misrepresent *Ellis* on the issue of where objectors' fees may be spent. *Ellis* did not reject the contention that objectors can be compelled to contribute no more than a pro rata share of the costs of statutory exclusive representation of their own bargaining unit. It *adopted* that standard, recognizing that those costs include "not only the direct costs of negotiating and administering *a* collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees *in the bargaining unit*." 466 U.S. at 448 (emphasis added). As Petitioners' Brief at 19-20 shows, *Ellis* applied this bargaining-unit standard to each activity on which it ruled, including the national union's magazine.[3]

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[3] *Ellis*, 466 U.S. at 450, did not hold that articles on the various topics it listed were chargeable even if concerning only units other than the objectors', as Respondents' Brief at 27 implies. *Ellis*' list is merely descriptive. It includes articles about "proposed or recently enacted legislation," which were not chargeable under the union's rebate policy, *Ellis v. Railway Clerks*, 685 F.2d

[note continued]

Arguing that nonmembers may be charged for services the affiliates of their bargaining agent provide to other bargaining units, but *not* to theirs, so long as the services are chargeable in the others, Respondents' Brief at 16 defines the question as whether the nonmembers' agent "is enabled through that affiliation to more effectively 'implement or effectuate [its] duties as . . . exclusive representative of the employees in the [petitioners'] bargaining unit.'" Addition of the phrase "more effectively" to the quote from *Ellis*, 466 U.S. at 448, confirms that the unions are recycling the argument that it is sufficient if "activities ultimately benefi[t] the union's collective-bargaining efforts." That argument was *rejected* in *Ellis* as not within "the free-rider rationale." *Compare id.* at 441 *with id.* at 448, 451-53.

Respondents' Brief at 24 asserts that no additional infringement on first-amendment interests arises when objectors are charged for services not provided to their bargaining unit, because the "expressive content" is the same as when the services are performed for that unit. That is false, even with regard to statutory exclusive representation.

An objector's bargaining agent deals with his own employer concerning the terms and conditions of employment of *only* employees with whom he shares a state-determined community of interest as to such matters. Bargaining units are not a mere "fortuity," as the AFL-CIO's Brief at 8 n.5 asserts, but are based on standards defined by statute and by administrative agencies which determine what units are appropriate for bargaining purposes. *Compare* Mich. Comp. Laws §§ 423.9e, .213 (1979) (Public Employment Relations Act ("PERA")), *with* 29 U.S.C. § 159(b) (1982) (National Labor Relations Act ("NLRA")) *and* 45 U.S.C. § 152, Ninth (1982) (Railway Labor Act ("RLA")). The agency "does not exercise this authority aimlessly; in defining bargaining units, its focus is on whether the employees share a 'community of interest'" in terms and conditions of employment.

1065, 1069 (9th Cir. 1982), *aff'd in part, rev'd in part*, 466 U.S. 435 (1984). The Court *adopted* and expanded that limit, holding that objecting nonmembers cannot be charged for articles reporting on *any* activities for which they cannot be charged, giving organizing and litigation concerning other units as examples. *Ellis*, 466 U.S. at 450-51 & n.11.

NLRB v. Action Automotive, Inc., 469 U.S. 490, 494 (1985); *accord Board of Regents v. Eastern Mich. Univ. Professors*, 46 Mich. App. 534, 537, 208 N.W.2d 641, 643 (1973); *see also* 9 T. Kheel, *Labor Law* § 50.04[2] (1990) (RLA). "A cohesive unit—one relatively free of conflicts of interest—serves the Act's purpose of effective collective bargaining, and prevents a minority interest group from being submerged in an overly large unit." *Action Automotive*, 469 U.S. at 494 (citations omitted).

In contrast, a union's structure is not determined by governmental interests at all, but by often haphazard, voluntary affiliations which occur "for a variety of reasons," including "'changing economic and political conditions.'" *NLRB v. Financial Inst. Employees*, 475 U.S. 192, 199 n.5 (1986) (quoting Note, *Union Affiliations and Collective Bargaining*, 128 U. Pa. L. Rev. 430, 431 (1979)). Affiliation is an internal union matter which "'does not directly involve the employment relation.'" *Id.* at 203 n.10 (quoting *Amoco Prod. Co.*, 239 N.L.R.B. 1195, 1195 (1979)). Indeed, the NLRA declares that the extent of union organization "shall not be controlling" in determining an appropriate bargaining unit. 29 U.S.C. § 159(c)(5) (1982); *see also Hotel Olds v. Labor Mediation Bd.*, 333 Mich. 382, 53 N.W.2d 302 (1952) (setting aside a unit re-determination made to conform to a changed union structure).

Unlike the bargaining unit, affiliation does not ensure a community of interest. Many national unions serve employees in more than one industry or occupation and in both the public and private sectors.[4] There is a "steady trend toward" a smaller number of larger internationals serving employees in "diverse parts of the economy." R. Freeman & J. Medoff, *What Do Unions Do?* 35-36 (1984).[5] Respondent Michigan ("MEA") and

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[4] Examples of unions involved in both sectors are the Service Employees, Teamsters, Communications Workers, Autoworkers, and Steelworkers. Troy, *Will A More Interventionist NLRA Revive Organized Labor?*, 13 Harv. J.L. & Pub. Pol'y 583, 628 (1990).

[5] *E.g.*, in 1974, about two-thirds of the members of the Steelworkers worked outside of steel, in twenty-eight different industries; the Autoworkers had members in twenty industries, the Machinists in eighteen, and the Teamsters in

[note continued]

National ("NEA") Education Associations are such "conglomerates," with locals of not only faculty in higher education, but also teachers in public elementary through high schools, educators in private and parochial schools, school secretaries, and school nurses. *See* Petitioners' Brief at 3-4.

Diversification may or may not provide economies of scale—a claim for which there is no evidence in the record—but does generate conflicts of interest:

> Occupational differences may * * * cause increasing strains and political factionalism within the union. More important still, it may be difficult for the union to provide effective service for a wide variety of occupations. Employees in different industries and trades have widely differing needs and problems. The law, regulations, and employment problems of government employees differ profoundly from those of workers in the private sector * * *. The needs and desires of white-collar workers are very different from those of manual workers.

D. Bok & J. Dunlop, *Labor and the American Community* 156-57 (1970).[6] The record here shows divergent interests with regard to bargaining among the different types of employees represented under the PERA by locals of the MEA and NEA. *See* Petitioners' Brief at 22. Other differences arise because some locals represent employees under statutes other than the PERA, in the

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eleven. "The Teamsters' efforts to organize any and all workers regardless of activities is indicative of the changed views of many * * * unions with respect to jurisdiction." Freeman & Medoff, *supra*, at 36. "There remain only a handful of national unions whose entire memberships fall within their original jurisdictions or are reflected in their union names"; "it is not unusual to find them representing workers in unrelated industries * * *." J. Wallihan, *Union Government and Organization in the United States* 66-67 (1985).

[6] Conglomeration can also produce misallocation of resources and excess bureaucracy. *See* Lewellen, *A Pure Financial Rationale for the Conglomerate Merger*, 26 J. of Fin. 521, 534 (1971); Windmuller, *Concentration Trends in Union Structure: An International Comparison*, 35 Indus. & Lab. Rel. Rev. 43, 56 (1981).

private sector or other states, which define the subjects of bargaining differently and permit strikes. Moreover, in the public sector there is necessarily a conflict of interests among bargaining units even when the type of employee is the same, because the employers are in unavoidable competition for scarce public resources.

Thus, a significant difference in the "expressive content" of bargaining and contract administration exists when an objector is coerced into association with workers whose interests are insufficiently close to his for the state to include them in his unit.[7] From the objector's perspective, those workers' terms and conditions of employment are matters not of employer-employee relations, but of "industrial relations" and, in the public sector, politics, *i.e.*, matters of public concern on which the objector must be treated as a citizen, not employee, for purposes of the first amendment. *See Pickering v. Board of Educ.*, 391 U.S. 563, 571-74 (1968); *Thornhill v. Alabama*, 310 U.S. 88, 102-04 (1940). The "expressive content" of bargaining which affects the objector only as taxpayer, consumer, competitor for public resources, and/or parent differs radically from that which affects him primarily as an employee. That difference is greatest as to bargaining on subjects which cannot be bargained in his unit due to differences in the types of employees or the statutes under which they bargain.

Moreover, the unions refuse to acknowledge that not just contract negotiation and administration in other units, but other activities which undeniably implicate core first-amendment interests, increase the constitutional infringement if the bargaining-unit standard is not used. Litigation not concerning the Ferris State College unit and reports in the MEA's publication about organizing were held chargeable below, in direct conflict with *Ellis*, 466 U.S. at 451-53. *See* P.A. 55a-57a, 80a; Petitioners'

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[7] *In the case of workers in other states, this is association which Michigan has absolutely no authority to compel* even if it perceived a community of interest. Michigan clearly cannot constitutionally create multi-state bargaining units, and it may not reach that result indirectly by requiring multi-state financing of bargaining. "What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *Rutan v. Republican Party*, 110 S. Ct. 2729, 2738-39 (1990).

Brief at 17-18 & n.9.[8] Also held chargeable were lobbying, ballot campaigns and other politics, publicity, and professional activities on matters related to bargaining at Ferris only indirectly or, in such cases as property-tax legislation and millages, *not at all*. *See* Petitioners' Brief at 17-18, 25-39.

That unions "normally" operate by preference on a cost-sharing basis is no compelling reason for permitting this broad denial of first-amendment rights. "'[I]f the age [and extent] of a pernicious practice were a sufficient reason for its continued acceptance, the constitutional attack on racial discrimination would, of course, have been doomed to failure.'" *Elrod v. Burns*, 427 U.S. 347, 369 n.22 (1976) (quoting *Illinois State Employees Union v. Lewis*, 473 F.2d 561, 568 n.14 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973)).

Affiliation is not analogous to an insurance policy or membership in an organization that guarantees specified services on demand for a flat rate, as the unions claim. Those are contracts in which one party, for consideration, agrees to pay money or provide specified services to another on a specified contingency. *See* 43 Am. Jur. 2d *Insurance* § 1 (1982). The Ferris Faculty Association ("FFA") has no legally enforceable agreements with the MEA and NEA *guaranteeing* additional services when the FFA has extra bargaining or grievance-adjustment needs.

Nor does the fee payor have a legal right to any services from the MEA and NEA. His only enforceable claim—and the only one that justifies a fee—is to fair representation in bargaining and contract administration. That statutory right is enforceable *only* against his exclusive representative, the FFA; the parent affiliates of an exclusive representative have no duty of fair representation. *See Teamsters Local 30 v. Helms Express*, 591

[8] Respondents' Brief at 28 n.25 quibbles that Petitioners' Brief at 20 said that organizing was held chargeable. That statement was cross-referenced to Petitioners' Brief at 17-18 & n.9, which detailed how reports in the MEA's publication about organizing were held chargeable. The contentions in Respondents' Brief at 27 n.25 that *Ellis*' holdings with regard to organizing and litigation are irrelevant here are rebutted in Petitioners' Brief at 19-21 and *supra* pp. 2-3.

F.2d 211, 217 (3d Cir.), *cert. denied*, 444 U.S. 837 (1979); *Sinyard v. Foote & Davies Div.*, 577 F.2d 943, 947-48 (5th Cir. 1978).

Moreover, insurance premiums and similar fees do not include costs of services which the payor can never use or which are received by individuals who pay no fee. MEA and NEA dues include the costs of services which *can never* be provided to the FFA, because other locals represent different types of employees and/or operate under different bargaining statutes. They also include the costs of services for employees who pay *no* fee, because even in Michigan not all locals have an agency shop, *see* J.A. 144 (J.A. 51-52), and the NEA has locals in states which prohibit it. Also, insurance rates and the like are higher for groups with a history or statistical probability of greater demand for services. The unions' flat rate affiliation fees do not reflect the reality that some locals always need more assistance from the MEA and NEA than others, due to different economic and/or statutory considerations.

The facts here graphically expose the speciousness of the "insurance" argument. The MEA and NEA did not prove that they *ever* delivered bargaining-related services to the Ferris unit that cost more than the dues and fees received from it. Indeed, although the FFA was involved in difficult contract negotiations in the year at issue, P.A. 29a-30a, the unions introduced no evidence of "catastrophic costs" underwritten that year by the MEA or NEA!

Possible economies of scale also supply no compelling reason to charge dissenters more than a fair share of the *actual* costs of chargeable services provided to *their own* unit. Mergers and integration do not change the principles of cost accounting. Corporations still charge different prices, based on actual costs, to customers who receive different types or quantities of services and products; they do not charge customers for services and products not received. Conglomeration merely increases the number of customers, services, and products among which a corporation or union can legitimately allocate its general *administrative* costs, and the number of customers among whom it can allocate other costs *common* to a *particular* service or product.

Allocation by bargaining unit "to charge nonmembers only for those activities that *actually* benefit them," *Communications Workers v. Beck*, 487 U.S. 735, 760 (1988) (emphasis added), is

not impossible, as the unions complain. Cost analysis procedures enable non-profit organizations to determine, and base fair charges on, the full direct and indirect costs of specific services provided to clients in individual service units. *See* R. Vinter & R. Kish, *Budgeting for Not-for-Profit Organizations* 225-305, 334-47 (1984). The MEA and NEA already record some costs by unit or group of units served. *See* Petitioners' Brief at 23-24. Both are multi-million dollar operations, P.A. 36a, 40a, with sophisticated, computerized accounting systems which could be adapted to do such allocations. *See* Pl.Ex. 133 (Trial Transcripts, Anderson at 67-70, 79-81, Vol. IV at 649).[9] Therefore, the state interests accepted by this Court as justifying the agency shop can be achieved by means significantly less restrictive of first-amendment freedoms than that approved below.

IV. THE STATE CANNOT COMPEL NONMEMBERS TO PAY FOR REPRESENTATION ON POLITICAL AND IDEOLOGICAL MATTERS OUTSIDE THE BARGAINING PROCESS EVEN IF THE SUBJECT AFFECTS EMPLOYMENT CONDITIONS

As shown in Petitioners' Brief at 13-14, the only duties which the PERA, like the federal labor statutes, imposes on an exclusive representative are fairly to represent all employees in a bargaining unit in negotiating and administering a collective agreement with their employer and in adjusting grievances arising under it. *Compare Abood*, 431 U.S. at 221-22 *with id.* at 223-24. The unions point to no provision of the PERA obliging a bargaining agent to engage in (or hold conventions or publish reports concerning) lobbying, ballot campaigns and other electoral politics, public relations, and professional activities which are not "an *integral* part of th[at] bargaining process," *id.* at 236 (emphasis added), but instead merely affect it or concern terms and conditions of employment in some other way.[10]

Respondents' Brief at 29-30 claims that those non-bargaining activities "relate" to bargaining sufficiently to justify coerced subsidies, because "labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context," including through "appeals to legislators." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978). But whether "labor's cause" is advanced is irrelevant in determining what activities may be charged to nonmembers, as *Eastex* recognized. Lobbying is a protected concerted activity, but the statute, in the case of the NLRA and RLA, or the Constitution, in this case, limits its funding to voluntary dues. *See id.* at 566 n.16 (citing *Machinists v. Street*, 367 U.S. 740 (1961), and *Abood*). If the test were whether an activity advances "labor's cause," not only lobbying affecting working conditions, but candidate support, ideological litigation, and organizing would be

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[9] This would not require *absolute* precision. *See Hudson*, 475 U.S. at 307 n.18. Nonetheless, " '[p]recision of regulation must be the touchstone' in the First Amendment context." *Id.* at 303 n.11 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

[10] The Brief for Amicus New Jersey Unions also identifies no provision of that state's Employer-Employee Relations Act, N.J. Stat. Ann. §§ 34:13A-1 to -29 (West 1988 & Supp. 1990), nor any decision construing it and article I, paragraph 19 of the New Jersey Constitution, which makes a union *exclusive representative* for other than collective negotiations, contract administration, and grievance adjustment with the employer of the employees for whom it is that agent. *See Lullo v. Fire Fighters Local 1066*, 55 N.J. 409, 262 A.2d 681 (1970); N.J. Stat. Ann. § 34:13A-5.3 (West 1988). Exclusive representation in New Jersey includes the "interpretation, application or claimed violation" *within the unit* of statutes and regulations "which directly and intimately impact upon the terms and conditions" of employment in it, but does not extend to the employer's determination of governmental policy which the legislature has excluded from collective negotiations: "with respect to the presentation of public employees' views to their governmental employers on matters not directly pertaining to the employment relationship, there would seem to be no justification for treating public employees any differently than citizens who are not employed by government." *Township of West Windsor v. PERC*, 78 N.J. 98, 113-16, 393 A.2d 255, 262-64 (1978). Because "public employees' special access to government applies only where the government is acting in the capacity of an employer, and not where it is acting in its capacity as public policymaker," *Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ.*, 78 N.J. 144, 163, 393 A.2d 278, 287 (1978), exclusive representation *a fortiori* also does not extend to the adoption of statutes and regulations by governmental bodies other than the employer.

constitutionally chargeable, which *Street*, *Abood*, and *Ellis* together deny.

That the state has *excluded from collective bargaining*, and left to the voters, legislature, executive branch, or market place of ideas, certain decisions setting or affecting terms and conditions of employment is no compelling reason for coercively subsidizing union efforts to influence those decisions, as the unions argue.[11] To the contrary, it proves that the state has no valid reason for such coercion.

Public-sector collective bargaining "is a special political process for making governmental decisions. It sets aside normal political processes and gives the union, as representative of the

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[11] *That situation is not unique to the public sector:*

> Congress and the state legislatures have imposed a number of terms and conditions on private industry to regulate the employment relationship and the operation of the work-place. These include [statutes] which regulate general conditions in employment, [statutes] which apply to a particular industry or class of employees, and a wide variety of state tort and worker's compensation laws. These statutes often represent the minimum standards under which employees may labor in this society and generally may not be altered in a collective bargaining agreement.

EEOC v. County of Calumet, 686 F.2d 1249, 1255 n.4 (7th Cir. 1982) (citations omitted); *accord Mine Workers Health & Retirement Funds v. Robinson*, 455 U.S. 562, 575 (1982).

In *Street*, 367 U.S. at 800-03, 811-18, Justice Frankfurter argued in dissent, like the unions here, that "the practical necessity for unions" to lobby to improve terms and conditions of employment by statute brought lobbying within the "free-rider" rationale. To avoid first-amendment "questions of the utmost gravity," *id.* at 748-50, the Court *rejected* that argument. It held that only "participation in the machinery of the Act" is within the "free-rider" rationale, and not lobbying and other union political activities. *Id.* at 761, 768-70 & n.17. That unions "must" "turn to the legislative arena • • • to further the interests of workers" was urged again in *Communications Workers v. Beck*, 487 U.S. 735 (1988). Brief for Petitioners at 46-47, *Beck* (No. 86-637). The Court rejected the argument again: in both the NLRA and RLA "Congress authorized compulsory unionism only to the extent necessary to ensure that those who enjoy union-*negotiated* benefits contribute to their costs." *Beck*, 487 U.S. at 746 (emphasis added). The judgment that "lobbying" was "indisputably *unrelated* to bargaining unit representation" was affirmed. *Id.* at 740-42 (emphasis added).

employees, a more effective voice in decisions" and "restricts the public's participation." It thus "should extend no further than the reasons which justify its creation." Summers, *Bargaining In The Government's Business: Principles And Politics*, 18 U. Tol. L. Rev. 265, 272, 274 (1987). When the state decides that decisions should be made not through bargaining, but through normal political or ideological processes, by definition it determines that unions should not have the greater voice of an exclusive representative in those decisions, but only the voice that they have as voluntary associations of citizens. It thus serves no rational, much less compelling, state interest to require nonmembers to give unions the increased voice that comes with a larger treasury.[12]

Indeed, the first amendment would not permit a state to make a bargaining agent the exclusive representative of all public employees in its unit for purposes of speaking to the voters, legislature, or executive branch on decisions that the state leaves to the normal political processes of ballot propositions, legislation, and regulation, or even for speaking publicly on matters subject to bargaining, because "participation in public discussion of public business cannot be confined to one category of interested individuals. To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." *Madison Joint School Dist. v. WERC*, 429 U.S. 167, 175-76 (1976) (footnote omitted). And, if the state cannot silence employees who oppose their bargaining agent's positions in the normal political processes, or in a public forum on a matter subject to bargaining, it cannot

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[12] If there is a compelling governmental interest *against* political use of corporate wealth amassed in part due to "the unique state-conferred corporate structure," there can be no compelling governmental interest *supporting* political use of large union treasuries amassed due to "the significant state-conferred advantages," *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391, 1397-98, 1400 (1990), of exclusive representation and agency shops. Indeed, paraphrasing Justice Brennan's concurring opinion in *Austin*, 110 S. Ct. at 1405-06, because of the state action inherent in the public-sector agency shop (as to which there is no corporate equivalent), the state has a "constitutional *duty* to protect the objecting" nonmember by "preventing a [union] it has [made exclusive representative] from exploiting those who do not wish to contribute to the [union's] political message."

accomplish the same result by requiring them to provide funds with which it drowns out their attempts at speech.[13]

Respondents' Brief at 39 argues that "the subject matter—and accordingly the degree of infringement of first-amendment rights—remains the same," whether the decisions which unions seek to influence with nonmembers' funds are made "at the bargaining table" or elsewhere, because those decisions all concern "terms and conditions of employment" and the forum is irrelevant. That is absurd on its face, because if all decisions affecting terms and conditions of employment were fungible, the state and federal governments would not have concluded that some are subject to bargaining and others "belong to the public and cannot be removed from the normal political processes," Summers, *supra* p. 15, at 274.

Moreover, the union's argument is contrary to this Court's decisions in *Pickering*, *Madison Joint School District*, and cases distinguishing "commercial" speech from other speech, all of which the unions ignore. *Pickering*, 391 U.S. at 568, 571-74, held that a teacher's public statements criticizing a proposed local tax increase to fund his school system were not a matter of employer-employee relations, on which the state's interests as employer

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[13] *Keller* does not establish that, as the Brief for Amicus New Jersey Unions at 5 says, "there is *no* constitutional barrier to a state's decision that members of a certain occupational group must financially support an association charged with advising the state on the regulations governing the occupation." Lawyers may be compelled to subsidize "the cost of the professional involvement" of the bar in "the regulation of the profession," because of their "*unique* status of being among those admitted to practice before the courts." *Keller*, 110 S. Ct. at 2235 (emphasis added).

Public employees have no such unique status: "[p]ublic employees are not basically different from private employees." *Abood*, 431 U.S. at 229. For public employees, the analog to "regulation of [the profession]" is not lobbying, it is "union negotiation with their employer." *Keller*, 110 S. Ct. at 2235. Moreover, when a public employee union lobbies it does not "provide specialized professional advice," *id.*, it acts as "an organized group playing an active role in the process much the same as other interest groups." Summers, *Public Employee Bargaining: A Political Perspective*, 83 Yale L.J. 1156, 1163 (1974); *see* M. Lieberman, *Public-Sector Bargaining* 162 (1980) ("the public-sector union is a hybrid union-political party"); Vieira, *Are Public-Sector Unions Special Interest Political Parties?*, 27 DePaul L. Rev. 293 (1978).

would be more significant, but "debate on matters of public importance," on which "it is necessary to regard the teacher as [a] member of the general public," fully protected by the first amendment.[14] In *Madison Joint School District*, the state restrained a teacher's speech on a subject of current bargaining. The Court held that the speech was fully protected by the first amendment, *precisely because it was made at a public meeting*, not at a negotiating session between the union and employer. 429 U.S. at 175-76 & n.10.

The forum—more precisely, the process—also is determinative in the cases recognizing that when government regulates lobbying and other direct public advocacy of ideas—including ideas related to the business interests of the speaker—the infringement on first-amendment rights is greater than when purely "commercial" speech is regulated. *See, e.g., Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-63 & n.5 (1980); *see also Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 135-41 (1961) (an anti-trust law must apply only to "private action," not lobbying to obtain "a law that would produce a restraint [of trade] or monopoly," because lobbying is protected by the first amendment). That distinction is implicit in *Abood* and *Ellis*, *see Roberts v. United States Jaycees*, 468 U.S. 609, 637-38 (1984) (O'Connor, J., concurring), as some of the unions' concessions as to what is nonchargeable implicitly acknowledge.

Purely "commercial" speech is "speech that proposes a commercial transaction." *Board of Trustees v. Fox*, 109 S. Ct. 3028, 3036 (1989) (emphasis omitted). When a bargaining agent negotiates a medical benefits plan which funds abortions, or seeks a clause in the collective agreement proscribing racial discrimination, those are "commercial" transactions, and their costs are chargeable to employees who oppose abortion or object to the nondiscrimination clause. *See Abood*, 431 U.S. at 222. But, when that union lobbies a legislature to fund abortions or pass legislation prohibiting discrimination in the workplace, it is engaged in

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[14] Significantly, the teacher's statements were in response to public statements by both the school board and *teachers' union* supporting the tax increase. *Pickering*, 391 U.S. at 566.

"the expression of political views * * * [and] the advancement of other ideological causes not germane to its duties as collective-bargaining representative," *id.* at 235, and the costs are not chargeable, *as Respondents' Brief at 38 concedes.*

The same distinction applies to all activities at issue here, even accepting the unions' mischaracterization of them.[15] Negotiation or administration of a contract provision setting wages, or retirement benefits, or the criteria for evaluating teachers is a "commercial" transaction, the costs of which are chargeable to nonmembers. Lobbying for legislation funding public education or regulating the retirement system for public employees; campaigning on ballot issues affecting the funding of public education; public relations "efforts to galvanize community support for the unions and for public education," Respondents' Brief at 43;[16] and the development and advocacy of "instructional methods and other professional skills," *id.* at 45,[17] are political or ideological activities, not "an integral part of the bargaining process," *Abood*, 431 U.S. at 236. *See Pickering*, 391 U.S. at 571-74. Their costs thus are not constitutionally chargeable to objecting nonmembers.

[15] On first-amendment issues, this Court does not defer to findings of lower courts, but examines the entire record anew. *Rankin v. McPherson*, 483 U.S. 378, 384-86 & n.9 (1987). As Petitioners' Brief at 25-26, 32-33, shows with specific record references to *evidence*, the lobbying and politics at issue here in fact are much broader than the unions, relying on selective quotation from the decisions below (and ignoring Judge Merritt's dissent), claim. Also, while it accuses petitioners of selectively excerpting the record to show that the MEA and NEA conventions and 13E Coordinating Council served primarily political and ideological purposes, the excerpts cited in Respondents' Brief at 47 n.47 are more selective and less revealing of the conventions' and Council's actual activities than the contemporaneous union documents cited in Petitioners' Brief at 39.

[16] Public relations designed to improve the overall image of a union is, like organizing, "proselytizing on behalf of the union, not engaging in representation of employees for bargaining purposes," AFL-CIO Brief at 29 n.19. Public relations on behalf of education generally is part of the normal political processes, since public education's funding through legislation and millages ultimately depends on community support for education. Public relations activities associated with the FFA's negotiations are not part of the bargaining process, but "public discussion of public business" which nonmembers have an "absolute right" not to subsidize. *See Madison Joint School Dist.*, 429 U.S. at 175-76 & n.10.

V. THE STATE HAS NO INTEREST IN COERCED SUBSIDIZATION OF THREATS OF ILLEGAL STRIKES

The unions make two disingenuous arguments for charging the nonmembers the costs of "publicizing, preparing for and threatening a strike that would be illegal under Michigan law." P.A. 11a.

First, they brazenly assert that "Michigan has never declared that it is unlawful, or even contrary to public policy, for a union to threaten an illegal strike." Respondents' Brief at 49. Because first-amendment rights are at stake, the burden of persuasion is not on the nonmembers to show that an activity is against public policy, but on the unions to show the state's compelling interest. *See, e.g., Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980); *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958). No state has an interest in coerced financing of threats of illegal acts. Moreover, Michigan *has* declared it against public policy to compel nonmembers to contribute to a fund collected in anticipation of public-sector strikes. *Male v. Grand Rapids Educ. Ass'n*, 98 Mich. App. 742, 749-50, 295 N.W.2d 918, 919-20 (1980), *appeal denied*, 412 Mich. 851 (1981).

Second, the unions claim that the disputed money was not spent solely to threaten or prepare for a strike. Respondents'

[17] Respondents' Brief at 45 n.45 chides petitioners for not citing "any particular articles in the *Teacher's Voice*" to show that the professional activities held chargeable here are ideological in nature. In fact, Petitioners' Brief at 36 referenced a list of titles of all articles in the *Teacher's Voice* in this category. The articles' ideological nature is typified by those on page ten of the October 12, 1981, issue: "'UN Celebrates 36th Year,' 'Big Fall Art Conference,' 'Phys Ed, Health Meeting Nov. 12,' 'Workshop on Alternate Careers Nov. 1,' 'Urban Operation Offers Energy Teaching Help,' 'Electric "Lifeline" Rates for Subsistence, Conservation Go Into Effect'." J.A. 239 (J.A. 24-26). *See Pacific Gas & Elec. v. P.U.C.*, 475 U.S. 1, 8-9 (1986).

Brief at 49. However, the only other purposes the expenditures served were providing a meeting place for members during negotiations and "informing the public of the issues involved in an attempt to bring public pressure to bear on the employer." P.A. 30a. Those purposes were not "plainly chargeable" as Respondents' Brief at 49 asserts. A temporary *strike* headquarters was not needed to hold union meetings; and, public pressure was not significant to the negotiations, because Ferris derives funds from tuition and legislative appropriations, not the local community. *See* J.A. 112. Even assuming that a strike was not intended,[18] the only real purpose for the "crisis center" and public information activities was to make the threat of a strike credible. Moreover, even where strikes are legal, creating a favorable climate of public sympathy and support for the union is "not 'reasonably necessary . . . for the proper effectuation' of collective bargaining." *Beck v. Communications Workers*, 776 F.2d 1187, 1211 n.32 (1985), *aff'd en banc*, 800 F.2d 1280 (4th Cir. 1986), *aff'd on other grounds*, 487 U.S. 735 (1988).

VI. CONCLUSION

The unions and their amici ask this Court both to abandon its traditional first-amendment strict scrutiny and to retreat from its consistent holdings in *Street*, *Abood*, *Ellis*, and *Beck* as to the limits of the state interests that justify the agency shop and the union activities that serve those interests. The Court should reject these siren calls, reverse the decision of the Sixth Circuit, and grant all relief requested in the Brief for Petitioners.

Respectfully submitted,

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[18] That assumption is contrary to the documentary evidence, which consists of *private* communications among union officials, not public statements as Respondents' Brief at 49 n.50 would have the Court believe. *See* Petitioners' Brief at 41 & n.33.

(5)

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In The

Supreme Court of the United States

October Term, 1990

JAMES P. LEHNERT, et al.,

Petitioners,

v.

THE FERRIS FACULTY ASSOCIATION-MEA-NEA, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeal for the Sixth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND H. PAUL LILLEBO IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND H. PAUL LILLEBO IN SUPPORT OF PETITIONERS

IDENTITY AND INTEREST OF AMICI

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) and H. Paul Lillebo, one of 92 plaintiffs in the lawsuit of *Lillebo v. Davis*, pending before the California Court of Appeal, No. 3 Civ. C006009, respectfully submit this brief amicus curiae in support of petitioners, James P. Lehnert, *et al.*

Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Amicus PLF is submitting this brief because it believes its public policy perspective and litigation experience in the agency shop arena will provide an additional viewpoint with respect to the issues presented. PLF has participated in numerous cases before this Court including amicus curiae participation in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). Recently, PLF attorneys represented the petitioners in *Keller v. State Bar of California*, ___ U.S. ___, 58 U.S.L.W. 4661 (1990) (limiting the integrated bar's ability to spend objecting member's dues for political activities). Additionally PLF attorneys represented the petitioner in *Cumero v. Public Employment Relations Board*, 49 Cal. 3d 575 (1989) (limiting the use of an objecting nonmember's fee to those activities statutorily authorized in California's Educational Employment Relations Act). PLF believes the lower court's opinion incorrectly analyzed the holdings of this Court resulting in objecting nonmembers being compelled to finance the political and ideological activities of a private

labor organization with which they disagree. This compelled financing abridges their First Amendment rights of speech and association.

H. Paul Lillebo is one of 92 plaintiffs in *Lillebo v. Davis*, No. 3 Civ. C006009, an agency shop lawsuit presently pending before the California Court of Appeal for the Third Appellate District. The plaintiffs in *Lillebo* are present and former employees of the State of California who are challenging California law which authorizes an agency shop fee to be used for lobbying purposes unrelated to the duties of an exclusive representative. These plaintiffs believe that use of dissenting employees' agency shop fees to underwrite the costs of lobbying activities and other policy related activities violates their fundamental constitutional rights of freedom of speech and association. These activities do not further the promotion of labor peace and stability.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 881 F.2d 1388 (6th Cir. 1989).

STATEMENT OF THE CASE

Under Michigan's Public Employment Relations Act, Ferris State College (Ferris), a four-year public institution of higher learning in Michigan, entered into a collective bargaining agreement with Ferris Faculty Association

(FFA). FFA is affiliated with the Michigan and National Education Associations (MEA and NEA, respectively). FFA has been recognized as the exclusive bargaining representative for the faculty of Ferris. Ferris and FFA negotiated an agency shop provision in which Ferris automatically deducted from the pay of nonmembers a "service fee" equal to the dues of members of the FFA. Of the $284 service fee required in 1981-82, $24.80 was paid to FFA, $211.20 went to the MEA, and $48 was collected by the NEA. *Lehnert v. Ferris Faculty Association*, 881 F.2d 1388, 1389 (6th Cir. 1989).

Six faculty members objected to the use of their service fees for any purposes other than FFA's duties as exclusive representative of the Ferris unit. To use the compelled fees for other purposes, they argued, infringed on their First Amendment rights of freedom of speech and association.

The Sixth Circuit Court of Appeals held that objecting nonmembers could constitutionally be charged for (1) expenditures for lobbying and similar "political" activities; (2) expenditures for services provided to other bargaining units; (3) costs of preparing for strikes; (4) conventions; and (5) public relations expenditures designed to enhance the reputation of the teaching profession. *Lehnert*, 881 F.2d at 1391.

SUMMARY OF ARGUMENT

The starting point in deciding the constitutionality of expenditures of agency shop must be the identification of

the government's compelling state interest. Merely claiming that an important state interest is at stake is not enough. That interest must actually be advanced by the law in question. This Court held, "[t]hus, insofar as the service charge is used to finance expenditures by the Union for the purposes of *collective bargaining, contract administration, and grievance adjustment*," the agency shop law was constitutional. *Abood v. Detroit Board of Education*, 431 U.S. 209, 225-26 (1977) (emphasis added). This Court went on to hold, however, the important governmental interest of labor peace and stability was not advanced by compelling employees financially to support causes not germane to collective bargaining, contract administration, and grievance adjustment. *Id.* at 235. Quoting from Thomas Jefferson, this Court stated: " ' "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." ' " *Id.* at 235 n.31.

This view represents the safeguards in the First Amendment. It leaves the government no power whatever to compel one person to expend earnings to advance lobbying and other policy related activities he or she would like to see defeated or to urge ideologies and causes he or she believes would be hurtful. The law can constitutionally authorize a compelled fee only when the recognized employee organization bargains directly with the employer on labor-management issues to foster labor peace and stability. *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435, 447 (1984); *see Abood*, 431 U.S. at 222-23; *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 302-03 (1986). The decision of the Sixth Circuit Court of Appeals goes beyond these limits. It

allows the compelled fee to underwrite the costs of lobbying and policy related activities *not* related to collective bargaining. Furthermore, this decision permits the compelled fee to be used to finance the preparation of illegal activities. The decision of the Sixth Circuit fails to establish a compelling state interest justifying an impingement on nonmembers' First Amendment rights of speech and association and should be reversed.

ARGUMENT

I

THE FIRST AMENDMENT PROHIBITS THE USE OF AN OBJECTING FEE PAYER'S SERVICE FEE FOR ACTIVITIES NOT SUPPORTED BY A "COMPELLING" OR "IMPORTANT" GOVERNMENTAL INTEREST

The constitutionality of compelled membership and financing of an organization as a condition of continued employment has been the subject of litigation for more than a third of a century. This Court first confronted the issue in *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956). That case concerned the constitutionality of a union shop agreement as authorized by Section 2, Eleventh, of the Railway Labor Act (45 U.S.C. § 152, Eleventh). *Id.* at 228. Such union shop agreements require all employees in the bargaining unit to become a member of and to pay service fees to the labor organization selected as exclusive representative. *Id.* at 228-29. This Court held that the enactment of Section 2, Eleventh, was well within Congress' authority under the Commerce Clause and that union shop did not violate employees' First Amendment rights. *Id.* at 235, 238. This Court noted, however, that if

the compelled fees collected from dissenting employees "are in fact imposed for purposes not germane to collective bargaining a different problem would be presented." *Id.* at 235 (footnote omitted).

That problem was indeed presented five years later in *International Association of Machinists v. Street*, 367 U.S. 740 (1961). This Court ruled that the Railway Labor Act prevented the labor organization from using a dissenting employee's compelled fees for political and ideological purposes. *Id.* at 768-69.

The constitutional issues raised in *Hanson* and *Street* were addressed in the seminal case of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). In that case, this Court considered a Michigan law providing for "agency shop" which permits private labor organizations representing governmental employees to negotiate for an agency shop clause in their contract with the employer. Agency shop requires employees who do not belong to the exclusive representative labor organization to pay that organization a service fee in an amount up to regular member dues as a condition of continued employment. *Id.* at 211. Although relying on *Hanson* to uphold the facial constitutionality of agency shop, this Court rejected the facile constitutional analysis of *Hanson* by noting:

> "To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests." *Abood*, 431 U.S. at 222.

Such an arrangement was constitutionally permissible only insofar as it was "used to finance expenditures by the Union for the purposes of *collective bargaining, contract*

administration, and *grievance adjustment*." 431 U.S. at 225-26 (emphasis added).

This Court in *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435 (1984), noted:

> "[B]y allowing the union shop at all, we have already countenanced *a significant impingement* on First Amendment rights." *Ellis*, 466 U.S. at 448 (emphasis added).

In spite of this "significant impingement of First Amendment rights," this Court stated that any interference with the employees' associational rights was constitutionally justified by the government's compelling state interest in industrial peace and stability fostered by the collective bargaining process. *Abood*, 431 U.S. at 222-23. *See Hanson*, 351 U.S. at 233; *Street*, 367 U.S. at 761; *Ellis*, 466 U.S. at 448; and *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 301 n.8 (1986). Any extraneous activity by the employee organization "not germane to its duties as collective-bargaining agent" could not be financed from fees paid by those who object to the organization's ideological viewpoint. *Ellis*, 466 U.S. at 447; *Abood*, 431 U.S. at 209; and *Communication Workers of America v. Beck*, 487 U.S. ___, 101 L. Ed. 2d 634, 646 (1988).

In *Hudson*, this Court again emphasized that only the government's compelling interest in industrial peace and stability justifies a limited intrusion upon nonmembers' First Amendment rights. *Hudson*, 475 U.S. at 301. This interest may be advanced by expenditures of compelled fees for activities that are "an integral part of the bargaining process." *Abood*, 431 U.S. at 236; *see Hudson*, 475 U.S. at 301. The nonmember employees "have a constitutional right to 'prevent the Union's spending a part of their

required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative.' " *Hudson*, 475 U.S. at 301-02.

In *Ellis*, this Court was primarily concerned with defining the lines between organizational expenditures that relate to collective bargaining that all employees in the bargaining unit are required to pay and those insufficiently related to justify their being imposed on nonmembers. To test these specific expenditures, this Court developed the following guidelines:

> "Hence, when employees such as petitioners object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are *necessarily or reasonably incurred* for the purpose of *performing the duties of an exclusive representative* of the employees in *dealing with the employer on labor-management issues*." 466 U.S. at 448 (emphasis added). *See Abood*, 431 U.S. at 222-23; *Beck*, 101 L. Ed. 2d at 657.

These principles were reaffirmed in *Hudson* when this Court stated:

> "[A]lthough the government interest in labor peace is strong enough to support an 'agency shop' notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the *procedure be carefully tailored* to minimize the infringement." 475 U.S. at 302-03 (emphasis added; footnote omitted).

The standard to determine chargeable costs certainly deserves the same careful tailoring required to determine

the propriety of collection procedures for the agency shop fee.

Recently, this Court in *Keller v. State Bar of California*, ___ U.S. ___, 58 U.S.L.W. 4661 (1990), held that the State Bar's use of mandatory dues to support political activities violated the First Amendment rights of lawyers who disagreed with the Bar's position. In analyzing the scope of permissible activities which may be financed with compelled fees, this Court applied the analysis used in agency shop fee decisions finding that there is "a substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of the employee unions and their members, on the other." *Keller*, 58 U.S.L.W. at 4663.

Relying on the holding in *Abood*, this Court in *Keller* noted "that a union could not expend a dissenting individual's dues for ideological activities not 'germane' *to the purpose for which compelled association was justified: collective bargaining.*" *Id.* at 4664 (emphasis added). This Court found the political and ideological activities of the State Bar, including its lobbying activities, were not germane to the purpose of the State Bar.

Simply put, these cases make clear the point that requiring nonmember employees to pay any agency fees impact on employees' First Amendment rights of association and speech. Such an intrusion on constitutionally protected freedoms is only justified if a compelling or important governmental interest is actually advanced by the intrusion. In the case of agency shop, the compelling state interest is labor peace and stability which is advanced only to the extent that the compelled exactions

do not exceed the employees' pro rata share of the costs of collective bargaining, contract administration, and grievance adjustment. Although this type of analysis is mandated by the constitutional freedoms at stake, it was ignored by the Sixth Circuit in its decision of this case.

II

THE USE OF COMPELLED FEES FOR LOBBYING ACTIVITIES FAILS TO SURVIVE THE LEVEL OF SCRUTINY REQUIRED BY THE FIRST AMENDMENT

In the case at bar, there is no constitutional justification to compel objecting nonmember employees to underwrite the costs of a private labor organization's lobbying and other political activities which, at best, are only tangentially and insubstantially involved in the collective bargaining process.

The Sixth Circuit stated that "it is clear . . . that dissenting employees in the private sector may not be charged for political or ideological union activities." *Lehnert*, 881 F.2d at 1391. It nonetheless held that "union lobbying to obtain funds for public education generally . . . and other similar political activities," including millage and ballot campaigns are chargeable because there "are, as noted . . . in *Abood*, fundamental differences between collective bargaining in the public sector and in the private sector." *Lehnert*, 881 F.2d at 1391-93. The Sixth Circuit misreads *Abood*.

In *Abood*, this Court recognized that "[t]he process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining

table, but subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process." *Abood* 431 U.S. at 236.

In this passage, this Court speculated that subsequent to face-to-face negotiations in the public sector the exclusive representative might have to convince an elected body to adopt the proposed agreement. This Court also seemed to recognize that budgetary decisions impacting on bargaining in the public sector are not always made at the same time as bargaining itself. This Court, does not, however, authorize use of compelled service fees for activities that are outside the scope of bargaining, contract administration, and grievance adjustment. Compelling an objecting nonmember employee to underwrite the costs of lobbying and policy related activities *not* related to collective bargaining is just too remote to justify infringing on individual First Amendment rights.

The closest analogy to lobbying is found in the *Ellis* opinion in its discussion regarding litigation expenses. There this Court determined that unless the expense of litigation directly concerns negotiating and administering the contract or settling grievance and disputes arising in the bargaining unit, objecting employees need not share the costs *because the litigation impacts the industry or protects the rights of employees generally. Ellis,* 466 U.S. at 453.

In the collective bargaining process, lobbying which is not limited to attempts to have the collective bargaining agreement funded is outside the scope of collective bargaining. It becomes substantive in nature and has

ideological overtones. Because that type of lobbying impacts employees in general, or even the public as a whole, objecting employees should not share in its costs. This Court has acknowledged Thomas Jefferson's view that " ' "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." ' " *Abood*, 431 U.S. at 234 n.31; *Keller*, 58 U.S.L.W. at 4663. While voluntary dues and fees collected from nonobjecting workers may be used to finance this political and ideological activity, it is an impermissible infringement on the constitutional rights of objecting nonmember employees to use their compelled fee for such purposes.

The bottom line of this analysis must rest on an identification of the state's interest in requiring agency shop. That interest cannot be merely to secure higher wages or better conditions for employees, for that type of interest can easily be advanced without infringing on nonmembers' First Amendment liberties—the Legislature could simply grant higher salaries. There would be no need or justification for compelled agency fees.

The state's interest must be something more. In *Hanson,* this Court recognized labor peace as one such interest. *Hanson,* 351 U.S. at 233. This interest was advanced through *a process* known as collective bargaining. *Id.* This Court accepted Congress' conclusion that "free riders" posed a danger to this process that could only be avoided by union shop agreement. *Id.* at 235. Yet this Court did not allow the use of compelled fees for just any purposes. Rather, compelled fees of objectors could only be used for purposes that advanced the government interest at stake—labor peace and stability.

That type of interest is not advanced in this case. This Court is not confronted with the dangers that free riders pose to the collective bargaining process. Instead, the issue is whether the union can compel nonmembers to pay for activities that the union has determined most effectively advance the goals of higher wages and better working conditions. Labor peace is not at issue here. The expenditures at issue have nothing to do with the collective bargaining process, and Michigan has identified no other state interest, important or otherwise, to justify the infringement on objectors' First Amendment rights.

III

COMPELLED FEES CANNOT BE USED TO SUPPORT ACTIVITIES UNRELATED TO THE SPECIFIC BARGAINING UNIT

By definition, an exclusive representative owes a statutory obligation to represent only those employees in a specific bargaining unit. Michigan Compiled Laws §§ 423.210 and 423.211 recognize that the exclusive representative of an appropriate unit is permitted to receive an agency shop fee from those employees who receive the benefits of this representation.

In the case at bar, the lower court decision allows activities not directly connected to the bargaining unit to be charged to dissenting employees. It allows the dissenting nonmember to be charged for lobbying and other politically related activities, activities of other bargaining units, conventions of MEA and NEA, public relations, and any other activity as long as the activity appears to advance some employment-related interest.

To allow these charges, the lower court ignored the protections of the First Amendment and the language in *Abood* requiring that there be a close relation of the activity to the bargaining unit. *Abood*, 431 U.S. at 236. This close relation was emphasized in *Ellis* in which this Court insisted that an expenditure must be for "activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the *bargaining unit*." *Ellis*, 466 U.S. at 447 (emphasis added). *See Keller*, 58 U.S.L.W. at 4664.

Yet the Sixth Circuit held that activities that advance employment related interests are constitutionally chargeable to objecting nonmembers "even if the chargeable activities . . . were unrelated to the specific bargaining unit of the dissenting employees." *Lehnert*, 881 F.2d at 1391-93. This is in stark contrast to the holding in *Ellis*.

The activities addressed by the Sixth Circuit are not germane to the purpose for which compelled association was justified. In *Abood* this Court recognized that the concept of agency shop implicates core free speech values, and is justified only to foster labor peace and stability through the collective bargaining process. Expenses must necessarily relate to the expenses of the bargaining unit itself to "defray the costs of collective bargaining, contract administration, and grievance adjustment." *Ellis*, 466 U.S. at 447. The employee organization cannot be allowed to charge objecting nonmembers with general lobbying and policy related expenses. To allow FFA to exact a compelled fee for lobbying, electoral campaigning, conventions, and public relations

unrelated to its bargaining unit forces the objecting nonmember to support ideological, nongermane positions with which he or she disagrees. This unjustifiably infringes on the First Amendment freedoms of speech and association of the dissenting employee.

IV

COMPELLED FEES CANNOT BE USED TO FINANCE ILLEGAL ACTIVITIES

Unlike the National Labor Relations Act, Michigan law bans public employee strikes. FFA has *no* right to strike under *any* circumstances, and *all* strikes by FFA are illegal. Section 423.202, Section 2, states that "[n]o person holding a position by appointment or employment in the government of the state of Michigan . . . or in the public school service . . . shall strike." Mich. Comp. Laws § 423.202, Section 2. Despite this law, FFA persisted in its preparation to use the strike weapon to achieve its goals. FFA financed its preparation with dissenting nonmembers' agency shop fees.

The Sixth Circuit ruled that objecting nonmembers can "be charged for union expenditures made in publicizing, preparing for and threatening a strike that would be illegal under Michigan law." *Lehnert*, 881 F.2d at 1393. The lower court reasoned that because FFA did not actually engage in an illegal strike, such negotiation tactics were within the range of reasonable bargaining tools. *Id.* at 1394. This is contrary to the holding in *Ellis* which states: "If the union cannot spend dissenters' funds for a particular activity, it has no justification for spending

their funds for writing about that activity." *Ellis*, 466 U.S. at 451.

Judge Merritt in his concurring and dissenting opinion, correctly points out that "[i]f the strike had gone forward and the house of the college president had been put to the torch, obviously the dissenters could not be charged with the gasoline for the fire. Likewise, dissenters should not be forced to pay the expenses for planning unlawful acts." *Lehnert*, 881 F.2d at 1396 (Merritt, J., concurring and dissenting).

Preparing for public employee strikes manifests nothing less than an intent on the part of FFA to prevent or obstruct the operations of government until their demands are satisfied. Rather than facilitate labor peace and stability, such actions often lead to violent and criminal acts. Requiring dissenting nonmember employees to finance these illegal activities violates their fundamental civil liberties.

CONCLUSION

The decisions of this Court establish that compelled service fees to a private labor organization constitute a significant infringement on objecting nonmembers' First Amendment rights of freedom of speech and association. Such an infringement on fundamental civil liberties can only be allowed if supported by compelling state interest. That state interest has been identified in the agency shop arena as the promotion of labor peace and stability through the collective bargaining process. FFA does not limit itself to such legitimate state interests. Instead, FFA

has used compelled service fees to pay for activities that it has determined most effectively advance the goals of higher wages and better working conditions including lobbying the Legislature and other policy related activities. These expenditures have nothing to do with the collective bargaining process and do not promote labor peace and stability. Such use of petitioners' compelled service fee constitutes a grievous injury to petitioners' fundamental civil liberties.

For the foregoing reasons, the judgment of the Sixth Circuit Court of Appeals should be reversed.

DATED: July, 1990.

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No. 89-1217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JAMES P. LEHNERT, *et alia*,

Petitioners,

v.

THE FERRIS FACULTY ASSOCIATION-MEA-NEA, *et alia*,

Respondents.

On A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

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BRIEF *AMICUS CURIAE* OF THE PUBLIC SERVICE RESEARCH COUNCIL, INC., IN SUPPORT OF PETITIONERS, URGING REVERSAL

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BRIEF *AMICUS CURIAE* OF THE PUBLIC SERVICE RESEARCH COUNCIL, INC., IN SUPPORT OF PETITIONERS, URGING REVERSAL

INTRODUCTION

Pursuant to Rule 37.3 of the Rules of this Court, the Public Service Research Council, Inc., submits this brief *amicus curiae* in support of petitioners, urging reversal of the decision of the Court of Appeals. Petitioners and respondents have consented to the filing of this brief.

INTEREST OF THE *AMICUS CURIAE*

The Public Service Research Council, Inc., is this nation's largest independent, nonprofit citizens' organization concerned with public-sector unionism and the influence of public-sector unions on governmental institutions, policies, and operations. With its sister organization, the Public Service Research Foundation, Inc., the Council widely distributes research and studies on public-sector unionism to the general public, the print and electronic media, the Congress, various governmental units throughout the United States, and other interested persons. The Council also engages in wide-ranging public education, legislative action, assistance to local citizens' groups, and legal challenges to the abuses of public-sector unionism.

More specifically, the Council has participated as *amicus curiae* in numerous cases before this Court, including *City of Madison, Joint School District No. 8* v. *WERC*, No. 79-946 (October Term, 1975); *Perry Education Association* v. *Perry Local Educators' Association*, No. 81-896 (October Term, 1981); and *Bu-*

reau of Alcohol, Tobacco, and Firearms v. *Federal Labor Relations Authority*, No. 82-799 (October Term, 1982); and earlier filed a brief *amicus curiae* in support of the petition for a writ of certiorari in this case.

The Council is concerned with the instant case because the Court of Appeals has ruled that:

- public-sector unions may impose themselves as the unwanted *political* "representatives" of dissenting non-union public employees in legislative, electoral, and other political arenas not an integral part of the collective-bargaining process; and
- those unions may demand that non-union employees in one local bargaining-unit pay "agency fees" for alleged "services" the unions supply to *other* employees in *other* local bargaining-units throughout the State and the United States.

These rulings expand public-sector collective bargaining far beyond constitutional boundaries.

The Council anticipates that petitioners' briefs will focus on the numerous and particular *details* of this case. In this brief *amicus curiae*, the Council hopes to provide this Court with an *overview* of the two fundamental issues the Court of Appeals' decision presents.

SUMMARY OF THE ARGUMENT

The Court of Appeals' decision is doubly defective: *First*, it licenses the Ferris Faculty Association (FFA) and its affiliates, the Michigan Education Association (MEA) and the National Education Association (NEA), to extract "agency fees" from non-union teachers for

"legislative lobbying and other political activities"[1] outside the definition of "collective bargaining" in the Michigan law *sub judice*[2] and in contradiction of *Abood* v. *Detroit Board of Education*[3] and *Ellis* v. *Railway Clerks*[4]. *Second*, the court's judicial *fiat* authorizes *statewide* and *nationwide* "exclusive representatives", far exceeding what Michigan has done, or has constitutional authority to do, in empowering FFA as petitioners' local "representative" for collective bargaining with Ferris State College.

ARGUMENT

I. The Court of Appeals' decision eviscerates *Abood* and *Ellis*, by licensing the Ferris Faculty Association to charge non-union teachers an "agency fee" for "legislative lobbying and other political activities" that are *not* "an integral part of the bargaining process" established by the Michigan legislature.

A. The Court of Appeals agreed with the District Court that "the legislative lobbying and other political activities engaged in by [FFA] and its affiliated unions were sufficiently related to the unions' duties as the collective bargaining representative of [petitioners] to be chargeable to them", "[b]ecause the terms and conditions of employment for the public sector employees * * * are obviously closely connected to the

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[1] Appendix to Petition for a Writ of Certiorari herein (Pet. App.) at 8a, 881 F.2d at 1392.

[2] *See* Mich. Comp. Laws § 423.215, sec. 15, *in* Pet. App. at 93a.

[3] 431 U.S. 209 (1977).

[4] 466 U.S. 435 (1984).

funding provided to public education".[5] For this reason, the court licensed FFA, MEA, and NEA to extract "agency fees" for "not only lobbying but also millage and ballot campaigns *necessary to fund public education*".[6] The Court of Appeals did *not* suggest—and the District Court did *not* find—that such "lobbying . . . millage and ballot campaigns" were "necessary to fund" or otherwise implement a specific collective-bargaining agreement between Ferris State College and FFA. Thus, the lower courts have upheld inclusion of the costs of "lobbying . . . millage and ballot campaigns" in the "agency fee", *not because these activities are part of the* ***present process*** *of collective bargaining at Ferris State College, but instead because they* ***may*** *affect the substantive* ***result*** *of* ***future*** *bargaining.*

B. This holding embodies three fundamental errors.

1. Under *Abood* and *Ellis*, the costs of *any* union activity not "an *integral part* of the bargaining *process*"[7], as defined by State law consistent with the Constitution, are not "necessarily or reasonably incurred for the purpose of performing the *duties* of an exclusive representative in dealing *with the employer* on *labor-management* issues"[8]. The analytical criteria applicable in this case are thus straightforward and unequivocal:

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[5] Pet. App. at 8a, 9a, 881 F.2d at 1392. On the confusion in the court's references to "the *unions'* duties as the exclusive representative" and to "employees represented by the *unions*", *see post*, pp. 18-21.

[6] Pet. App. at 9a (emphasis in original).

[7] Abood, 431 U.S. at 236 (emphasis supplied).

[8] Ellis, 466 U.S. at 448 (emphasis supplied).

• Michigan law narrowly defines "bargain[ing] collectively" as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract, ordinance or resolution incorporating any agreement reached if requested by either party".[9]

• The constitutionality of this definition, which parallels corresponding provisions in the private-sector National Labor Relations Act[10] and Railway Labor Act[11], was sustained in *Abood*[12]. To date, this is the *only* definition of "collective bargaining" this Court has ever sanctioned.[13]

• *Abood* noted that

> [t]he *process of establishing a written collective-bargaining agreement* prescribing the terms and conditions of public employment may require not

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[9] Mich. Comp. Laws § 423.215, sec. 15, *in* Pet. App. at 93a-94a. Thus, the unions' reliance on such lower-court decisions from other States as *Robinson* and *Champion*, which addressed more expansive statutory definitions of "collective bargaining", is bootless. *See* Robinson v. State of New Jersey, 741 F.2d 598, 602 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985); Champion v. State of California, 738 F.2d 1082, 1086 (9th Cir. 1984), *cert. denied*, 469 U.S. 1229 (1985).

[10] Section 8(d), 29 U.S.C. § 158(d).

[11] Section 2, First, 45 U.S.C. § 2, First.

[12] 431 U.S. at 217-26.

[13] Again, this highlights the fecklessness of the unions' reliance on cases such as *Robinson* and *Champion*. *See* note 9, *ante*.

> merely concord at the bargaining table, but *subsequent approval* by other public authorities; *related* budgetary and appropriations decisions might be seen as *an integral part of the bargaining process*.[14]

Abood thus forbids interpolation into Michigan's statutory definition of "collective bargaining" of "lobbying . . . millage and ballot campaigns" that are not "an *integral* part of the bargaining *process*"—that is, "[t]he *process* of establishing a written collective-bargaining agreement".

Key terms here are "process" and "integral". That some union activity may "relate" to collective bargaining in a substantive sense is not enough to bring the activity arguably within the category of "bargaining", if that activity is not itself operationally part of "the [statutorily defined] *process* of establishing a written collective-bargaining agreement".[15] Moreover, the activity must be "an *integral* part of [that] process", in the sense of "necessary to make a whole" of it.[16] The lexicographical inference that *Abood* used the adjective "integral" to imply *comple-*

[14] 431 U.S. at 236 (emphasis supplied).

[15] *E.g.*, union lobbying for statutory benefits that public employees receive in addition to the terms and conditions of employment that derive from collective bargaining, and which benefits are not the subjects of bargaining, is arguably "related" *substantively* to bargaining because it deals with the same general subject-matter: *viz.*, obtaining benefits for public employees *qua* employees. It is not *operationally* part of collective bargaining, however, because it involves a *different process* altogether.

[16] *Webster's New Twentieth Century Dictionary* (2d ed. unabrgd., 1970), at 953.

tion is strengthened by the Court's reference to "*subsequent* approval" and "*related* budgetary and appropriations decisions"—decisions that *follow* and *implement* the "written collective-bargaining agreement" which they "approv[e]" and to which they "relat[e]".

• Finally, *Ellis* held that "agency fees" may include only those union "expenditures * * * necessarily or reasonably incurred for the purpose of performing the *duties* of an exclusive representative of the employees in dealing with *the employer* on *labor-management issues * * * in the bargaining unit*".[17] This reinforces *Abood* on two counts: *first*, because "the duties of an exclusive representative" derive from, reflect, and find their natural limitations in the statutory definition of "collective bargaining"; and, *second*, because the representative's "duties * * * in dealing with the employer * * * in the bargaining unit" imply a *process-oriented* analysis with a circumscribed target ("the employer"), subject-matter ("labor-management issues"), and locus ("the bargaining unit").

Against this analytical background, the Court of Appeals' inclusion of "lobbying . . . millage and ballot campaigns" within collective bargaining is unsupportable:

First, FFA "bargain[s] collectively" when it "meet[s]" *with the employer* (Ferris State College) to negotiate the employer's *costs* for the services of its employees, which to some degree *the employer itself*

[17] 466 U.S. at 448 (emphasis supplied).

can control through the process of negotiations[18]. "[L]obbying . . . millage and ballot campaigns", distinguishably, involve attempts by FAA, MEA, and NEA to increase the employer's *income* through appeals to *the Michigan legislature* or the *voters*. "[L]obbying . . . millage and ballot campaigns" thus fall outside of collective bargaining at the very threshold, because these techniques deal, *not* with the employer, but instead either with a separate, independent, and superior level of government (the legislature) or with the people as voters, in order to influence how the legislature allocates its income or how the people tax themselves to provide income to the government.

Second, "lobbying . . . millage and ballot campaigns" address no matter the employer can affect through the "meet * * * and confer" process of bargaining. How the employer allocates the resources already available to it to compensate its employees is the subject-matter of collective bargaining, in which both the employer and FFA are required by law to participate "in good faith".[19] How superior levels of government or the public provide those resources in the first instance is the subject-matter of *other, independent* political processes, in which neither the em-

[18] The duty "to bargain collectively" "does not compel either party to agree to a proposal or require the making of a concession". Mich. Comp. Laws § 423.215, sec. 15, *in* Pet. App. at 93a-94a.

[19] Of course, a different situation would be presented were the "lobbying . . . millage and ballot campaigns" directed towards funding of a specific collective-bargaining agreement that depended for its implementation on legislative or popular approval. That is not the case here, however.

ployer nor FFA is required to participate, in which the "good faith" *vel non* of any party is irrelevant, and through which FFA obtains no guarantee and the employer incurs no obligation that any enhanced revenue accruing to the employer will in fact ever be "passed through" to the employees in the form of increased compensation.

Third, unlike collective bargaining, "lobbying . . . millage and ballot campaigns" impact upon far more than simply "wages, hours, and other terms and conditions of employment". Indeed, these activities affect both taxation and governmental budget-allocations—and, through the latter, influence the very prioritization of competing public policies. None of these matters is, by the wildest stretch of the imagination, within the competence of collective bargaining. Neither could any of them be brought within that competence, without the most radical restructuring of the traditional American system of representative government and individual political liberty.[20]

The Court of Appeals rationalized its decision by pontificating that

> [i]t cannot be disputed that governmental budget and appropriations decisions directly affect the terms and conditions of employment for public employees. To represent their members effectively, public sector unions must necessarily concern themselves not only with negotiations at the bargaining table but also with advancing their

[20] *See, e.g.*, E. Vieira, Jr., *"To Break and Control the Violence of Faction": The Challenge to Representative Government from Compulsory Public-Sector Collective Bargaining* (Public Service Research Foundation, 1980).

members' interests in legislative and other "political" arenas.[21]

But, even were this description arguably factual, the question would nevertheless remain whether Michigan's collective-bargaining law has delegated to unions *acting as the statutory "exclusive representatives" of non-union employees* all the powers the Court of Appeals imagined the unions need "[t]o represent their members effectively"—or whether the law has left the unions to "advanc[e] their members' interests in legislative and other 'political' arenas" *as merely private organizations* with *no* coercive authority over non-union employees. Surely, a statutory grant of only part of the power unions want to "advanc[e] their members' interests" involves no logical or legal inconsistency. Similarly, merely stating the truism that "governmental budget and appropriations decisions directly affect the terms and conditions of employment for public employees" leaves unanswered the question of whether *particular* "decisions" are "an integral part of the bargaining process" under *Abood* and *Ellis*. Surely, *Abood* would not have noted that "related budgetary and appropriations decisions *might* be seen as an integral part of the bargaining process" if, as the Court of Appeals naively argued, *all* such decisions *must* be subsumed within "collective bargaining".

In sum, the Court of Appeals was accidentally insightful when it argued that public-sector "unions must necessarily concern themselves *not only with negotiations at the bargaining table* but also with * * * legislative and other 'political' arenas". For the

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[21] Pet. App. at 7a, 881 F.2d at 1392.

unions' activism in this case is palpably *not* "an integral part of the bargaining process" but instead an adventure in "*other* 'political' arenas".

2. The Court of Appeals' decision is also fatally flawed because its implicit "rule"—that the costs of "legislative lobbying and other political activities" that may implicate "appropriations decisions" are includable in an "agency fee"—is *unlimited* by any intelligible principle. Indeed, this is the inescapable result of the Court of Appeals' shifting its focus from the *process* of collective bargaining (which can be accurately defined in terms of either the *employer's* involvement or the ratification or implementation of a specific *agreement*) to the activities of the union with respect to third parties in "other 'political' arenas" that *may* affect the *results* of that process *in futuro*.

First, the "rule" is overbroad even as to lobbying. The amount A that a governmental employer may be allocated (by the legislature or by popular vote), and part of which amount the employer may use to pay its employees, depends on the amounts B, C, D, . . ., Z the government has available or the people supply to fund all other public programs—which amounts, in turn, depend on the levels of taxation and borrowing the community sustains, the public priorities for allocation of revenue, and numerous other controversial issues of public policy. According to the Court of Appeals, a union's statutory authority to negotiate the *portion* of A that employees will receive also empowers it to compel non-union employees to subsidize its legislative and electoral activism with respect to A itself, with respect to the size and priority of every governmental expenditure that could possibly compete with A, with respect to every means by which the

government could raise revenue that might be allocated to *A*—in short, to lobby on essentially anything and everything!

Second, the Court of Appeals' "rule" is especially ill-advised in the context of the "millage and ballot *campaigns*" involved here. As a practical matter, a political continuum extends from "lobbying", through "millage and ballot campaigns", *to the election of candidates for public office*: For no "lobbying" can succeed if incumbent legislators lack sympathy for the lobbyists' goals; and the difference between "millage and ballot campaigns" and candidates' campaigns asymptotically approaches zero in the real world of politics[22]. Therefore, if the Court of Appeals correctly concluded that "collective bargaining" subsumes union activism in whatever "other 'political' arenas" the unions "must necessarily" enter "'[t]o represent their members effectively", including the *electoral* "arena", then the costs of union participation *in partisan political elections* must also logically be includable in "agency fees". *Abood* held, however, that non-union employees may *not* be required to "associate with a political party" or to subsidize union expenditures "on behalf of political candidates, or toward the advancement of other ideological causes not germane to [the union's] duties as collective-bargaining representative".[23] Obviously, a severe tension exists between the

[22] *E.g.*, the difference between two candidates for local or state office often lies in their contrary positions on funding education, on promoting public-sector unionism, or on some other issue "related" to collective bargaining in the loose sense favored by the Court of Appeals.

[23] 431 U.S. at 235 (footnote omitted).The direct linguistic linkage between "political candidates" and "*other* ideological causes

Court of Appeals' theory and the holding of *Abood*—a tension unresolvable, in any *principled* fashion, by pretending that both are correct.

3. Doubly unavailing is the purely result-oriented rationalization for the Court of Appeals' "rule" that, if FFA's "lobbying . . . millage and ballot campaigns" increase the funds available to Ferris State College, at some later date the latter may agree through collective bargaining to augment its employees' compensation.

First, the contention proves too much, as it would license the unlimited inclusion in "agency fees" of the costs of lobbying by "exclusive representatives" in the *private* sector.[24]

not germane to [the union's] duties as collective-bargaining representative" demonstrates that *Abood* considered support of "political candidates" "not germane to [the union's] duties" as a matter of law.

[24] *E.g.*, if lobbying to increase a private employer's income is a part of collective bargaining, a private-sector union intent on enhancing the employer's market share might legitimately lobby for: protectionist legislation against foreign competition; the outlawing of domestic products that compete with or substitute for the employer's product; government price-fixing; government contracts for the employer under existing laws; new laws under which government contracts might be obtained; regulation of private conduct that requires the public to use the employer's product; government-guaranteed loans or other "bail outs" of the employer; nationalization of the employer's industry to guarantee permanent public subsidies; or even socialization of all private industry!!

Analogous lobbying by public-sector teachers' unions might include: outlawing or limiting the number of private schools, either directly or by imposing onerous "standards"; opposing tuition tax-credits or -deductions for private schools; opposing

Second, the contention proves too little, as it neglects the requirement that unions use "agency-fee" schemes "to charge nonmembers only for those activities that actually benefit them".[25] This Court has repeatedly said that "benefits" for nonunion employees are the *quid pro quo* for their payments of "agency fees" in both the private and the public sectors.[26] In the private sector, the crass materialism of the traditional union argument—"the more compensation the better"—crudely approximates reality.[27] But only *crudely*: for no significant economic gains through collective bargaining for employees of one employer fail to produce corresponding (albeit usually hidden) economic losses, primarily for employees, in other segments of society.[28] However, in the private sector, the positive and negative effects of collective bargaining are almost exclusively *economic* in character.

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government aid to private schools; or raising general taxes, on the theory that even a fixed percentage of an absolutely increasing governmental revenue equates with an absolutely increasing income for the public schools (and possibly an increase in compensation for public-school teachers).

[25] Communications Workers v. Beck, ___ U.S. ___, ___, 108 S. Ct. 2641, 2656 (1988).

[26] *E.g.*, Railway Employes' Dep't v. Hanson, 351 U.S. 225, 238 (1956); Machinists v. Street, 367 U.S. 740, 761 (opinion of the Court), 776 (opinion of Douglas, J.)(1961); NLRB v. General Motors Corp., 373 U.S. 734, 740-41 (1963); Abood, 431 U.S. at 221-22.

[27] Here, *amicus* assumes *arguendo* that increases in the income of the employer translate in part into increases in the compensation of its employees.

[28] *See, e.g.*, W.H. Hutt, *The Strike Threat System* (Arlington House, 1973); G.L. Velasco, *Labor Legislation from an Economic Point of View* (Liberty Fund Press, 1973).

And, presumably, if a legislature has constitutional authority to impose private-sector collective bargaining at all, it may also require employees to bear the hidden economic costs of the system as the price of the economic benefits it supposedly generates. In the *public* sector, contradistinguishably, the costs of collective bargaining are almost exclusively *political*.[29]

This Court has no scale for measuring *political* costs, and no formula for comparing *political* to *economic* costs (or benefits). Indeed, the very statement of the problem implies its insolubility. Were a simple constitutional answer at hand, the "spoils system"—in which public employees must suffer the political costs of supporting the party in power in order to obtain the economic benefits of public employment—would be legitimate, which it is not.[30] In the context of public-sector collective bargaining, the *erzatz* compromise of *Abood* conflates all costs and benefits as "economic", in loose analogy to the private-sector case.[31] This may caricature the truth within a local bargaining-unit, where the union limits its activities to interactions with *the employer alone* over matters of employee-compensation and other "bread-and-butter" *labor-management* issues. But the *Abood* com-

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[29] *E.g.*, if the union ultimately succeeds in obtaining increased compensation for non-union teachers through "lobbying . . . millage and ballot campaigns", but only at the cost of cuts in some other non-education-related program that those teachers favor (such as highway construction, environmental protection, funding of the arts, and so on), the teachers have been compelled to accept an economic benefit in exchange for a political detriment.

[30] *See* Rutan v. Republican Party of Illinois, ___ U.S. ___, 58 U.S.L.W. 4872 (1990).

[31] *See* 431 U.S. at 229-32.

promise collapses into unreality as soon as the union begins interacting with higher levels of government, and injecting its influence into "legislative and other 'political' arenas".

If *Abood* may be a workable compromise within the narrow ambit of "collective bargaining" as there defined (that is, *excluding* all "lobbying" not "an integral part of the bargaining process"), in this case the Court of Appeals' misreading of that decision transmogrifies *Abood* into a monster worthy of Dr. Frankenstein, with a body designed for purely economic activity along the lines of private-sector collective bargaining but with a brain infected by rabid political activism.[32] This Court never intended such a horrific result in *Abood*, and must not abide it now.

C. Should this Court sanction the Court of Appeals' notion that the costs of whatever FFA, MEA, and NEA choose to do "in legislative and other 'political' arenas" are includable in "agency fees" if those activities "sufficiently relat[e]" to collective bargaining,[33] it will impose on the federal courts a Sisyphean task. Hereafter, the aggressive activism of these "highly politicized organization[s]"[34] will generate one intractable case after another, requiring the courts to distinguish in the fashion of Solomon between activities "in legislative and other 'political' arenas" that "relat[e]" to collective bargaining *vel non*. *All* of these cases will be of *constitutional* dimension. *None* of them

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[32] The District Court candidly found that both MEA and NEA are "highly politicized organization[s]". Pet. App. at 32a, 39a, 643 F. Supp. at 1313, 1317.

[33] Pet. App. at 8a, 881 F.2d at 1392.

[34] Note 32, *ante*.

will present a *principled* basis for decision. And, because resolution of each case will turn on vague conceptions of "relatedness" to collective bargaining under *various* public-employment statutes, they will generate sets of *different* and *constantly changing* "constitutional" doctrines for each State, never-ending conflicts among the District and Circuit Courts, and a permanent stream of petitions for writs of certiorari to this Court.

This consequence reinforces the insight of Justice Powell in *Abood* that "no principled distinction exists" between a public-sector union and "a political candidate or committee",[35] confirms academic studies that public-sector unions (and, in particular, NEA and its affiliates) are a species of "political party",[36] and condemns this Court's reluctance to face the issue squarely heretofore and to rule that "agency-fee" schemes (whatever their merits in the private sector) are out of place in the inherently political context of public employment.[37]

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[35] 431 U.S. at 256-57 (separate opinion) (explaining the respects in which "the public sector union is indistinguishable from the traditional political party in this country").

[36] *See* Vieira, "Are Public-Sector Unions Special Interest Political Parties?", 27 *DePaul L. Rev.* 293 (1978).

[37] *See* Knight v. Minnesota Community College Faculty Ass'n, 571 F. Supp. 1 (D. Minn. 1982)(three-judge court), *aff'd mem.*, 460 U.S. 1048 (1983). In *Knight*, this Court refused to review the constitutionality of "exclusive representation" by what the *Knight* plaintiffs claimed was an inherently political organization (the NEA and two of its Minnesota affiliates), even though the record was, according to the uncontradicted testimony of Professor Gordon Tullock, the distinguished political scientist, "more complete than I have ever seen before on any pressure group". Jurisdictional Statement in *Knight*, No. 82-901, at 10-11.

If, however, this Court feels compelled to re-affirm the compromise struck in *Abood*, to render that compromise workable it must rule that *no* union "lobbying" or other activism "in legislative or other 'political' arenas" is chargeable to non-union employees unless it is clearly "*integral* to the bargaining *process*". Unlike *substantive* "relatedness" to collective bargaining, "the bargaining *process*" is capable of clear-cut statutory and factual definition by reference to specific *procedural* interactions of unions, employers, and (in rare instances) those higher levels of government that may ratify or implement collective-bargaining agreements. Moreover, whether some union activity is "integral" to a *defined* bargaining process is itself definable to a degree of precision orders of magnitude superior to any attempt to "relate" (say) union "lobbying" to bargaining through a chain of conjectural causation similar to the one in the children's story that begins "For want of a nail the horseshoe was lost . . . ". Finally, by resting analysis in these cases on a *procedural* foundation, this Court can maximize the *general applicability* of the rule of decision across State jurisdictional lines, which is a prime desideratum of constitutional adjudication.

II. The Court of Appeals' decision authorizes a regime of *statewide* and *nationwide* "exclusive representatives" beyond what the Michigan legislature did, or constitutionally could do, in establishing "collective bargaining" for public employees in that State.

The Court of Appeals held that petitioners could be required to pay "agency fees" to MEA and NEA, even though: (i) the latter are *not* the actual "exclusive representative" for teachers at Ferris State College; and (ii) petitioners received no equivalent in

actual benefits for all the "fees" paid, much of the benefits accruing to persons in other bargaining-units in Michigan and other States.[38] By judicial *fiat*, this decision creates a regime of *statewide* and *nationwide* "exclusive representatives" that the Michigan legislature did not and could not constitutionally have established itself.

A. The Court of Appeals denied that, although MEA and NEA are not "the actual exclusive bargaining representative", "this distinction amounts to more than a technical difference in union organization" where MEA and NEA are "affiliated" to FFA.[39] The court did not explain why the vagaries of "*union* organization" should control—but the effect of its decision is to bootstrap MEA and NEA, through their self-defined "affiliation" with FFA, into the status of petitioners' "exclusive representatives" under Michigan law.[40]

What meant this remarkable term, "affiliation", to the courts below? Not that MEA, NEA, and FFA constitute a single organization; for the District Court found that MEA and NEA are legally *separate* corporations.[41] Not that the three are "integrated" (as organizational science understands that term) to the point of functioning as one organization; for the unions never themselves claimed, let alone proved, to be

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[38] Pet. App. at 6a, 10a-11a, 881 F.2d at 1391, 1393.

[39] Pet. App. at 6a, 881 F.2d at 1391.

[40] Mich. Comp. Laws § 423.211, sec. 11, *in* Pet. App. at 93a.

[41] Pet. App. at 19a-20a, 643 F. Supp. at 1308.

"integrated" in this sense.[42] Rather, "affiliated" imported only that: (i) MEA and NEA "provid[e] collective bargaining support services to [their] local affiliates"; (ii) their "budget[s] for those services may be financed from agency payer 'service charges' "; and (iii) the "agency shop fees" in a particular local need *not* "be calculated only with respect to services to [that local]", because "the *statewide* involvement of the MEA" and "the *nationwide* involvement of the NEA" in collective bargaining are "relevant to determining [their] agency shop fee[s]".[43] That is, "affiliated" simply embodied the lower courts' *fiat* that licensed MEA and NEA to charge non-union teachers at Ferris State College for "services" *those teachers never receive* because the "services" are delivered on a "statewide" or "nationwide" basis to *other* employees!!

Thus, self-evidently, "affiliated" is mere adjectival double-talk designed to camouflage forced subsidization of MEA and NEA *as institutions*, regardless of "services" they provide—*or do not provide*—to non-union employees such as petitioners. Such a disinformational label cannot control decision of the First-

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[42] In *Knight*, after extensive hearings, the three-judge District Court found that NEA and its State and local affiliates are not "integrated". *See* 571 F. Supp. at 6-7. NEA should be collaterally estopped to claim the opposite here. *See, e.g.,* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); *Restatement (Second) of Judgments* (1980), §§ 27-29.

[43] *In re* Bridgeport Spaulding Community Schools, Nos. C79-J-353 & CU79-J-51 (A.L.J., 24 Feb. 1986), Slip Op. at 34 (emphasis supplied), adopted as ruling Michigan case-law by the District Court, Pet. App. at 58a, 643 F. Supp. at 1326, and by the Court of Appeals, Pet. App. at 6a, 881 F.2d at 1391.

Amendment issues here.[44] Moreover, contrary to the Court of Appeals, *Ellis* endorsed *no* "agency-fee" payments to "affiliates" *un*related to *actual* services the "affiliates" provided.[45]

B. The District Court's rationalization for allowing "agency-fee" payments to MEA and NEA where the latter render *no* collective-bargaining services to petitioners is more elaborate than the Court of Appeals', but quite as fallacious.

1. "[S]ince unions operate on a cost-sharing basis," argued the District Court, "extraordinary expenses incurred by one unit in any given year are spread out over all units represented by the union".[46] How

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[44] *See, e.g.,* City of Madison, Joint School Dist. No. 8 v. WERC, 429 U.S. 167, 173-74 & n.5 (1976); Riley v. National Fed'n of the Blind, ___ U.S. ___, ___, 108 S. Ct. 2667, 2677 (1988).

[45] The Court of Appeals argued that *Ellis* allowed charging non-union employees "for the costs of the union's national convention, even though employees in other bargaining units participated in and benefited from such conventions". Pet. App. at 10a, 881 F.2d at 1391. The point, however, is that the petitioners in *Ellis themselves* benefited from the convention, because it was "an integral part of the bargaining process" under *Abood*.

The Court of Appeals also pretended that *Ellis* allowed the union to charge for publications reporting on "chargeable activities * * * *unrelated* to the specific bargaining unit of the dissenting employees". Pet. App. at 10a, 881 F.2d at 1393. This is untrue. *Ellis* held only that a union "may charge objecting employees for reporting to them about those activities it can charge them for doing". 466 U.S. at 451. Later in the opinion, this Court held that "[t]he expenses of litigation not having a connection with the bargaining unit are not to be charged to objecting employees". *Id.* at 453. Taken together, these holdings clearly refute the Court of Appeals' contrary notion.

[46] Pet. App. at 56a, 643 F. Supp. at 1325.

unions choose to "operate", however, is not controlling. The *Constitution* requires that "agency fees" have a rationally demonstrable connexion to benefits *the payers of those fees in fact receive*. "Agency-fee" schemes are permissible to "spread out" expenses among employees within the selfsame unit receiving the services generating those expenses—not to divorce services from payments among different units simply because some have "extraordinary expenses" relative to others. Otherwise, *all* the units involved in "cost-sharing" would constitute *one* unit for purposes of the "agency fee".[47]

2. "[C]ooperative cross-funding", the District Court offered, "enables the union to effectively represent * * * units in hard cases that will have an impact on the greater whole".[48] Surely, the ability to rifle the treasuries of other locals enables MEA and NEA to assist some "units in hard cases"—but what, besides airy conjecture, justifies the conclusion that this "*will* have an impact on the greater whole", including the pilfered locals, later on or even ever? And what is "the greater whole", but an *assumed* state-wide or nationwide MEA or NEA unit?

MEA and NEA whitewash this "cross-funding" scheme as a species of "insurance"-payments for contingent services that are "*equally* available to all"

[47] This "cost-sharing" theory shows most clearly how the Court of Appeals' ruling fuses all local units represented by an NEA-"affiliate" in Michigan into *one* grand State unit, and that state unit into *one* grand national unit embodying all the other State and local units with NEA-"affiliated" representation.

[48] Pet. App. at 56a, 643 F. Supp. at 1325.

local units statewide and nationwide.[49] This is childish fantasy.[50] True "insurance" is an *enforceable* contractual *right* in the insured to receive a definite, stipulated benefit upon the occurrence of some defined event. Conversely, the fictional "insurance" of the MEA-NEA "cross-funding" scheme is a *non*enforceable *absence of right* to receive, at an *un*certain time and in *un*defined circumstances, some *un*certain "service" from MEA or NEA—neither of which is the certified "exclusive representative" of the local bargaining-unit, and therefore neither of which is subject to the judicially enforceable "duty of fair representation".[51]

3. The District Court then complained that "a unit-by-unit breakdown of * * * [union] expenditure[s] * * * would *logically* lead to drastic fluctuations in the amount of the service fee".[52] So what? Why should

[49] *E.g.*, Respondents' Brief in Opposition in No. 89-1217, at 12.

[50] Perhaps *hubris* is a more descriptive term. For what private groups in American society other than militant public-sector unions such as MEA and NEA would dare to contend that they have a right: (i) to dictate to individuals what "services" those individuals "may" need in the future; (ii) to charge "fees", the amounts of which the groups themselves unilaterally determine, for the claimed "availability" of the "services", regardless of whether those "services" are ever actually delivered, or are even capable of being delivered, to the payers; and then (iii) to resist all attempts by the payers to limit the "fees" to group activities that actually benefit them?

[51] This is crucially significant, because only the enforceability of the "duty of fair representation" arguably saves "exclusive representatation" from unconstitutionality. *See* Steele v. Louisville & N.R.R., 323 U.S. 192, 198-99, 203, 207 (1944).

[52] Pet. App. at 56a, 643 F. Supp. at 1325.

not each local unit have to live within its own budget, and itself pay for whatever level of collective-bargaining services it desires? On what theory—other than that "agency-fee" schemes may redistribute employees' income among local units throughout both Michigan and the United States—can the District Court's desideratum of "stable dues" override the constitutional command that the "fees" paid must be proportionate to the benefits received?

4. Finally, the District Court argued that "imposing a constitutional requirement of a unit-by-unit breakdown of * * * expenses would create an unreasonable and unmanageable administrative burden on" MEA and NEA.[53] "[A]dministrative convenience alone", however, "is insufficient to make valid what otherwise is a violation of [constitutional] law".[54]

C. Both the Court of Appeals and the District Court assumed that Michigan law does, and constitutionally may, allow a statewide and nationwide pooling of "agency fees". This assumption lacks even argumentative support.

1. Michigan law states that "[r]epresentatives * * * selected for purposes of collective bargaining in *a unit* appropriate for such purposes, shall be the exclusive representatives of all the public employees in *such unit*".[55] Nothing in the statute suggests that the

[53] Pet. App. at 57a, 643 F. Supp. at 1325.

[54] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 647 (1974). *See* Ellis, 466 U.S. at 444. *See also* Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 306-07 (1986) (First Amendment and fundamental fairness require that burden of proof as to amount of "agency fee" must be borne by the union).

[55] Mich. Comp. Laws § 423.211, sec. 11, *in* Pet. App. at 93a (emphasis supplied).

"unit" automatically becomes *statewide* or *nationwide* as to any of the powers of the "exclusive representative" simply because the latter has state or national "affiliates".

2. The Michigan legislature lacks constitutional power to require public employees in Michigan to finance collective bargaining by public employees in other States, or to require public employees in other States to subsidize collective bargaining by public employees in Michigan. Yet those powers would have to exist for the "cost-sharing" scheme of "agency fees" upheld by the lower courts to be lawful.

3. Even within Michigan, "agency fees" must reflect a *quid pro quo* for benefits non-union employees actually receive through collective bargaining. A statewide "cost-sharing" system among all Michigan locals represented by an MEA "affiliate" divorces—*and is intended to divorce*—"fees" from benefits, and is therefore unconstitutional on its face. *A fortiori* a nationwide scheme embracing all NEA-"affiliated" locals throughout the United States!

In sum, the theory of the lower courts might be arguable if the purpose of collective bargaining in Michigan were—or constitutionally could be—to force nonunion public employees to guarantee the existences and finance the activities of MEA and NEA *as institutions*, regardless of the lack of benefits the individual employees receive from their "agency-fee" payments. This is not the purpose of bargaining under Michigan law, and may not constitutionally be its purpose under *Abood* and *Ellis*.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court of Appeals.

Respectfully submitted,

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No. 89-1217

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

JAMES P. LEHNERT, *et al.*,
Petitioners,

v.

THE FERRIS FACULTY
ASSOCIATION-MEA-NEA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *and* BRIEF OF CENTER ON NATIONAL LABOR POLICY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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July 26, 1990

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---

BRIEF FOR CENTER ON NATIONAL LABOR POLICY AS *AMICUS CURIAE*

INTEREST OF THE *AMICUS CURIAE*

The Center on National Labor Policy, Inc. ("Center") is a public interest legal foundation chartered to provide legal assistance to individuals whose statutory and constitutional rights in the labor arena have been violated by powerful, organized interests such as labor unions and governmental entities.

A continuing subject of concern for the Center has been the development of non-union member employee rights enforced under section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), and pursuant to section 2, Eleventh (a) of the

Railway Labor Act, 45 U.S.C. § 152(a). The practices of the labor organizations underlying the instant case involve the chargeability of certain activities to the non-member employees as related to their statutory duty as a collective-bargaining agent

The Center, as a public-interest organization, believes that the individual rights of consumers, taxpayers, workers, and public citizens are paramount to the collective rights of private organizations such as labor unions. Briefs amicus curiae have been filed by the Center advocating the validity of this public policy interest in other cases before the Court, including, *Koons Ford of Annapolis, Inc. v. NLRB*, No. 87-1305; *Breen v. ILGWU*, No. 83-1791; *Archie E. Brown v. FEC*, No. 81-1905; *Larry V. Muko, Inc. v. NLRB*, No. 80-1798; *Donald Schriver, et al. v. Pennsylvania Building and Construction Trades Council*, No. 80-1257; *New York Telephone Co. v. N.Y.S. Dept. of Labor*, No. 77-961.

Center attorneys have also previously appeared before the Court representing the similar interests of objecting non-member employees under the National Labor Relations Act in *Price v. International Union, UAW*, 487 U.S. 1229, 108 S.Ct. 2980, 101 L.Ed.2d 924 (1988), *vacating*, 795 F.2d 1128 (2d Cir. 1986), *rev'g* 621 F. Supp. 1243 (D. Conn. 1985). The remand of that case has taken the two-hundred fifty-two plaintiffs in *Price* through a summary judgment path now permitting their local bargaining representative to rely upon the expenditures of the International Union, UAW, for purposes of determining chargeable expenses and allowing an evidentiary "local presumption" that the percentage of chargeable expenditures of the International Union can be applied to the Local Union rather than financial disclosure by the Local Union based on its direct unit expenditures. In reliance upon the decisions arising under the public sector laws, without proof that the activities charged relate to the statutory bargaining duties with their employer, *Price v. International Union, UAW*, 722 F. Supp. 933, 939 (D. Conn. 1989), the district court adopted the reasoning of the vacated Second Circuit opinion as its own. A notice of appeal to the United States Court of Appeals for the Second Circuit was timely filed by the plaintiffs in *Price* on July 23, 1990.

Moreover, Center attorneys have monitored the judicial progression of the litigation in *Crawford v. Air Line Pilots*, 870 F.2d 155 (4th Cir. 1989), which presents a liberal rule of chargeable bargaining expenditures. That case has been vacated based upon the en banc rehearing in the Fourth Circuit under Fourth Circuit Rule 35(c). *Crawford* was argued Oct. 3, 1989 and the decision deferred pending final outcome of Lehnert by this Court). *Crawford* was cited by the majority panel opinion in the case before this Court.

The parties to the instant case are primarily focusing on the important constitutional and judicial review aspects under the public sector and Railway Labor Act cases of this Court. Equally important, however, is the underlying substantive claim made by Petitioner and dismissed by the Sixth Circuit—that enumerated public policy interests will cause a divergence in the application of the agency fee resolving analysis imposed by this Court previously in the duty of fair representation cases arising under public sector laws, the Railway Labor Act, and the National Labor Relations Act, and settled under those statutes.

The Center on National Labor Policy can thus bring to this case a diverse perspective not presently represented. Therefore, the Center's participation will assist the Court in obtaining full consideration of the public-interest issues.

ISSUE PRESENTED

Whether the court of appeals erred in determining that a liberal "relationship" standard between activities engaged in by a union and expenses chargeable to non-members is consistent with the Court's duty of fair representation analysis that the activities for which non-members may be charged must relate to the scope of the agency granted, *i.e.*, to bargaining unit based activities only.

SUMMARY OF ARGUMENT

The Center on National Labor Policy is deeply concerned that the decision of the court of appeals, holding it permissible under the Constitution for labor organizations to assess and

spend a non-member's money for purposes unrelated to the bargaining obligation owed to the bargaining unit in which the objector belongs, will be interpreted by other federal and state courts considering the obligations owed by objectors under the statutory duty of fair representation, to permit agency fee monies to be collected and spent for causes hitherto not permitted under this Court's decisions in *Ellis v. BRAC*, 466 U.S. 435 (1984) and *Communications Workers of America v. Beck*, 108 S. Ct. 2641 (1988). The impact on the administration of the Railway Labor Act ("RLA"), National Labor Relations Act ("NLRA"), state law, and undertaken by objectors' private lawsuits and charges before the National Labor Relations Board, will be undercut and threatened, if labor organizations charge nonmembers "dues" incorporating activities for lobbying and persuasion unrelated to the bargaining duty upon which the payment of the agency fee has long been conditioned.

ARGUMENT

I. THE UNIONS' ACTIONS ARE PURSUANT TO PUBLIC POLICY ESTABLISHED BY THE STATE OF MICHIGAN AND MADE POSSIBLE BY VIRTUE OF STATUTORY POWERS CONFERRED BY THE STATE, BUT CAN ONLY BE TOLERATED WITHIN THE SCOPE OF ACTS PERFORMED BY THE UNION IN THE BARGAINING UNIT WITH THE EMPLOYER FOR WHOM IT COLLECTS FEES

The state of Michigan bestowed extraordinary power and authority upon labor unions and has modeled its statutory power grants to labor unions after the National Labor Relations Act, 29 U.S.C. § 158 (1947). Indeed, provisions enlarging the rights of Michigan public employees "adopt word-for-word the analogous provisions of the National Labor Relations Act." *Michigan Employment Relations Comm. v. Reeths-Puffer School Dist.*, 391 Mich. 253, 259, 215 N.W.2d 672 (1974); *Detroit Police Officers Ass'n v. City of Detroit*, 391 Mich. 44, 53, 214 N.W.2d 803 (1974). In fact, the State of Michigan has gone even further in authorizing labor unions to enter into collective-bargaining agreements under which [illegible] guarantee of continuing employment to

teachers, *viz*, tenure, is conditioned upon the extraction of agency fees or dues to the union. This duty to pay dues supersedes all tenured rights earned in professional service to the educational community. *White Cloud Educ. Ass'n v. Board of Educ. of the White Cloud Public Schools*, 101 Mich. App. 309, 300 N.W.2d 551 (1980). *See also Detroit Board of Educ. v. Parks*, 98 Mich. App. 22, 296 N.W.2d 815 (1980); *Eastern Michigan Univ. v. Morgan*, 100 Mich. App. 219, 298 N.W.2d 886 (1980).

The Michigan Supreme Court has also recognized that public employees were given the statutory right of collective bargaining by the legislature. MICH. COMP. LAW. § 423.211 (1970). *Civil Service Comm. v. Wayne County Board of Supervisors*, 384 Mich. 363, 184 N.W.2d 201 (1971). For purposes here, the State does not recognize the unions' right to bargain as a constitutional right. *Welfare Employees Union v. Michigan Civil Service Comm.*, 28 Mich. App. 343, 184 N.W.2d 247, 254 (1970). Neither did such right exist at common law in Michigan.

However, the action of the public sector union becomes more intrusive as traditional areas of state power is subjected to collective-bargaining. As Professor Summers discussed in *Public Sector Collective Bargaining Substantially Diminishes Democracy*, 1 Government Union Review 5 (Winter 1980):

> A public employee collective bargaining statute typically carves out a large portion of formerly exclusive legislative and budgetary jurisdiction and requires that the agency share that jurisdiction with the union in the guise of 'bargaining over terms and conditions of employment.' In the educational field, such matters as the length of the school day, class size, teacher recruitment and retention policies, wages and fringe benefits and much else is taken to fall within the phrase 'bargaining over terms and conditions of employment.' Yet decisions on such matters are decisions of public law and policy. Indeed, collectively they go far to determine the very quality of the benefit the government unit exists to provide.

Professor Summers' findings on public employment were adopted by this Court in *Abood v. Detroit Fed. of Teachers*, 431 U.S. 209, 230 (1977): Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 U. Cinn. L. Rev. 669 (1975). His description of the activities for which bargaining can be conditioned relates specifically to the bargaining unit rather than expansively to other activities. That was the Court's expectation.

Yet, in the same breath, the Court argued that there was no "uniqueness" between private and public sector employers. But the natural expansion and gravitation of union hierarchical activities into a determined political agenda, did not also contemplate that the public sector union could charge non-members for lobbying that it could not do charge for in the private sector.[1] This dilemma, represented by the facts of this case, were foreshadowed by the concurring Justices in *Abood*.

In *Abood*, the Court specifically found that "public employee unions attempt to influence governmental policymaking," but accepted the tension placed on the First Amendment rights by the agency shop. *Id.* at 231. Then, Mr. Justice Rehnquist, aptly noted in his concurring opinion, that "success in pursuit of a particular collective bargaining goal will cause a public program or a public agency to be administered in one way; failure will result in its being administered in another way." *Id.* at 243 (concurring opinion). Mr. Justice Powell's vigorous concurring

[1]For example, the International Union of Automobile and Aerospace Workers represents workers in both the public sector and the private sector. Thus, the workers in *Price v. International Union, UAW, supra*, under the NLRA, and the workers in *Cramer v. Matish*, 705 F. Supp. 1234, 1240 (W.D. Mi. 1989), under the Michigan PERA, receive two different financial disclosures from the International Union under the "Local presumption" theory being applied in the lower courts. *Price*, 722 F. Supp. at 939; *Cramer v. Matish*, 705 F. Supp. at 1241. It is inconceivable that the structure of constitutional law and the duty of fair representation turn upon the employer for whom the employee works. This Court's insistence on enforcing one standard will benefit unions and agency-fee payers alike by ensuring that the lower court's "read off one sheet of music," not three (as is occurring today based on what industry the employee works in).

opinion predicted what would become an unlimited power grant to public sector unions unless more than a "relationship" to collective bargaining was adopted as both a restraint on unions and as protection for First Amendment rights, *Abood*, 431 U.S. at 261 n. 16.

The factor that necessitates the application of chargeable amounts similarly in the three statutory schemes (NLRA, RLA, and public sector) is best represented by the brief of the Detroit Federation of Teachers itself in *Abood*, where it argued that unless "state action" existed to limit the union's actions, collection of a full agency fee would be contrary to the holding of the Court in *Hanson*:

> In *Railway Employees Department v. Hanson*, 351 U.S. 225 (1956), this Court unanimously upheld section 2, Eleventh of the Railway Labor Act, which authorizes labor agreements requiring every employee to tender "the periodic dues, initiation fees and assessments...uniformly required as a condition of acquiring or retaining membership." Appellants would distinguish Hanson as a mere "private sector" case, there was no genuine "state action" in that case, they say, because the federal statute only permits but does not require agreements requiring financial support by employees. Appellants' "state action" disclaimer flies in the face of this Court's express ruling in *Hanson*....Thus, there was clearly "state action" in *Hanson*.

Brief for Appellee Detroit Federation of Teachers, *Abood, et al. v. Detroit Board of Education, et al.*, at 18-19 (September 1976).

In *Beck*, *supra*, the Court found "it not only permissible but altogether proper to read § 8(a)(3), as we read § 2, Eleventh," to "prohibit the collection of fees in excess of those *necessary* to cover the costs of collective bargaining," citing as evidence the fact that "congressional opponents of the Taft-Hartley Act's union-security provisions understood the Act to provide only the most grudging authorization of such agreements, permitting 'union-shop agreement[s] only under limited *and administratively burdensome* conditions.'" 108 S. Ct. at 2653-54 (emphasis added-

)(quoting S. Rep. No. 105, Pt. 2, 80th Cong. 1st Sess., 8 Leg. Hist., at 470 (Minority Report)). It was therefore expected by Congress that unions were to assume an administrative burden in exchange for the right to collect dues.

Hence, this Court recognized the existence of a plain limitation on a private sector union's power to collect dues, for it emanates from the same concepts on First Amendment limitations as a public teachers' union does. *Abood*, 431 U.S. at 230 ("the very real differences between exclusive-agent collective bargaining in the public and private sectors are not such as to work a greater infringement upon the First Amendment interests of public employees."). This concept was erroneously rejected by the Sixth Circuit below:

> While it is clear, under *Street* and *Allen*, that dissenting employees in the private sector may not be charged for political or ideological union activities, we believe that the lobbying and other "political" activities of the union in this case were, as required by *Ellis*, "reasonably employed to implement or effectuate the duties" of the Ferris Faculty Association as the exclusive representative of the *public* employees at Ferris State College.

Pet. 7a.

Recently, in *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391, 1400-01 (1990), this Court faced the question whether the regulation of independent expenditures under the Michigan Campaign Finance Act violated the First Amendment. The Court made the appropriate comparison with *Abood* and *Beck* and stated the equivalent rule in the labor law:

> An employee who objects to a union's political activities thus can decline to contribute to those activities, while continuing to enjoy the benefits derived from the union's performance of its *duties* as the exclusive representative of the *bargaining unit* on labor management issues. As a result, the funds available for a union's political activities more accurately reflects members' support for the organization's political views

> than does a corporation's general treasury. (Emphasis added).

Certainly, this comparison made to both the public and private sector cases, demonstrates the inherent power of an employee to object to "political activities" that do not relate to the union's "duties" for the "bargaining unit."

Finally, in *Keller v. State Bar of California*, 110 S. Ct. 2228 (1990), this Court necessarily compared the State's integrated bar dues requirements with the First Amendment analysis undertaken in *Abood*, *Hanson*, *Ellis*, and *Hudson*. The Court stated that

> We think that these differences [to provide specialized legal advice to the public] between the State Bar, on the one hand, and traditional government agencies and officials, on the other hand, render unavailing respondent's argument that it is not subject to the use of compulsory dues as are labor unions representing public and private employees.

1109 S. Ct. at 2235.

This statement recognizes that the Court has long viewed the restraint on public and private sector union dues as the same, although the legal basis might be different. In the Court's further citation to *Ellis*, the line was drawn back "to the purpose for which compelled association was justified": "the test must be whether the challenged expenditures are necessarily or reasonably incurred *for the purpose of performing the duties* of an exclusive representative of the employees *in dealing* with *the employer* on labor-management issues. 110 S. Ct. at 2236 (emphasis added).

Accordingly, the decision of the Sixth Circuit violates the principals set out by this Court limiting a union to collecting dues from objectors only for activities undertaken in the performance of its duties vis-a-vis the employer with whom it agreed under the relevant law to negotiate with. The record in the case at bar, permitted the Respondents Ferris Faculty Association/MEA/NEA to charge for lobbying at the State level when the contract is

signed by Ferris College. That act violates the bargaining unit principle applied to properly charged fees.

II. THE DUTY OF LABOR UNIONS TO LIMIT THEIR CHARGEABLE EXPENDITURES TO ACTIVITIES GERMANE TO THE BARGAINING UNIT IS FUNDAMENTAL TO ANY RATIONAL INTERPRETATION OF THE DUTY OF FAIR REPRESENTATION UNDER ANY STATUTE

Two fundamental issues are raised under the Court's decision in *Abood* and *Communications Workers v. Beck*, 108 S.Ct. 2641 (1988), applicable to resolving this case: first, whether employees under Michigan law or the NLRA/RLA can be required to fund their exclusive representative's (or their representative's affiliate's) collective bargaining costs incurred for employees in other bargaining units; and second, must the representative's financial disclosure to unit employees be made on a bargaining unit by bargaining unit costs basis. If this Court were to change this standard, the repercussions under the RLA and NLRA would be overwhelming.

In *Abood*, 431 U.S. at 221 n.15, this Court set up as a baseline for consideration of its constitutional analysis, the limitation it had imposed under the National Labor Relations Act in order to avoid an open-ended assault on the Freedom of Association protected by the First Amendment through the establishment of collective bargaining. For "[t]o compel employees financially to support their collective-bargaining representative has an impact on their First Amendment interests." *Id.* at 222. Hence, the Court went on to review that limitation imposed under the NLRA with the reference to *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976), that,

> "the controlling statutes have long been interpreted as imposing upon the bargaining agent a responsibility *equal in scope to its authority*, 'the responsibility and duty of fair representation.'"

> . . .with respect to the railroad industry. . .and. . .with respect to those industries reached by the National Labor Relations Act, the duty of fair representation has served as a 'bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.' *Vaca v. Sipes, supra*, 386 U.S. at 182, 87 S.Ct. 903.

Furthermore, in *Abood*, the Court justified the constitutional intrusion on individual rights made by the State of Michigan on Congress' similar "assessment of the important contribution of the union shop to the system of labor relations," *id.* at 222, it established. *Id.* at 224 ("governmental interests advanced. . .are much the same as those promoted by similar provisions in federal labor law."). But the judgment that the Congress could so intrude had a recognizable limitation, which the *Street* Court explained, and the Court in *Abood*, 431 U.S. at 223, adopted:

> The furtherance of the common cause leaves some leeway for the leadership of the group. *As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy.* If that were allowed, we would be reversing the *Hanson* case, *sub silentio*.

This limitation the Court found also applied under Michigan law:

> A union so designated is under a duty of fair representation to all employees in the unit, whether or not union members. *E.g., Lowe v. Hotel & Restaurant Employees, Local 705*, 389 Mich. 123, 145-152, 205 N.W. 167, 177-180; *Wayne County Community College Federation of Teachers Local 2000 v. Poe*, 1976 Mich.Emp.Rel.Comm'n 347, 350-353; *Local 836, AFSCME v. Solomon*, 1976 Mich.Emp.Rel.Comm'n 84, 89.

Abood, 431 U.S. at 224.

The judgment of the Michigan Court of Appeals was therefore enforced in *Abood*, 431 U.S. at 232, "insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes." This same bargaining unit standard has been applied by the Court in all cases.[2]

But, while there may be some issues in *Abood* or *Beck* that require major discussion and analysis by the parties here, the "bargaining unit standard of chargeability and disclosure" should *not* have been among them or rejected by the court of appeals below. The bargaining unit standard is enshrined in the plain language of the NLRA, RLA and this Court's public sector decisions and are part and parcel of the effectuation of the "governmental interest" at all levels of the federal/state system, through all types of election procedures, and are uniformly applied, for example, in Board decisions and court cases to reduce or eliminate conflicts of interest among represented employees.

Abandonment of the bargaining unit concept in agency fee cases would not only require excision of language from the NLRA and presumably the RLA,[3] but also revision of the Board's Case Handling Manual, and recantation of the Board's positions in its own case decisions and before the courts. And it would exacerbate, and not reduce or eliminate, the conflicts of interest inherent in exclusive representation.

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[2]In *Beck*, 108 S. Ct. at 740-42, the Court affirmed the lower courts' holding that it was a breach of the duty of fair representation to expend plaintiffs' fees for "purposes other than bargaining unit representation."

[3]The Court in *Beck*, 108 S. Ct. at 2648-49, stated the decision in *Street* "is controlling, for § 8(a)(3) and § 2, Eleventh are in all material respects identical. Indeed, we have previously described the two provisions as 'statutory equivalent[s],' *Ellis v. Railway Clerks*, 466 U.S. 435, 452 n. 13, 104 S.Ct. 1883, 1894 n. 13, 80 L.Ed.2d 428 (1984), and with good reason, because their nearly identical language reflects the fact that in both Congress authorized compulsory unionism *only to the extent necessary* to ensure that those who enjoy union-negotiated benefits contribute to their cost." (Emphasis added).

In short, every available resource concerning the intent of Congress[4] and the Board's administration of the NLRA confirms that employees can only be charged for their § 9 (a) representative's negotiation and enforcement of the governing collective bargaining agreement, and that the required financial disclosure must be on a unit by unit basis.[5]

The reasons for this position are found in the Act, the Board's Rules & Regulations, the Board's Case Handling Manual, Board decisions, this Court's decisions, and decisions in Duty of Fair Representation cases. As set out *supra*, this statute is relevant. We take those categories of authorities in the order listed without belaboring them.

CHARGEABILITY STANDARD

The NLRA itself is the departure point for the correct analysis of the issues presented:

> Representatives designated or selected for the purposes of collective bargaining by the major-

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[4]The limitation on dues applied by this Court in *Street* and *Hanson* arise from the potential conflict with the First Amendment this Court did not presume Congress intended to transgress. The "nearly identical language" of the NLRA § 8(a)(3) and RLA § 2, Eleventh "reflects the fact that in both, Congress authorized compulsory unionism only to the extent necessary to ensure that those who *enjoy* union-*negotiated* benefits contribute to *their* costs." *Beck*, at 2649 (emphasis added). Employees do not "enjoy" the benefits negotiated in other units, and the purported benefits of lobbying, political action, public relations, and professional/educational activities are not "negotiated" benefits.

[5]The potential impact on Board caselaw is a fair one to make since the Michigan Public Employment Relations Act was fashioned after the NLRA and its Public Employment Relations Commission decides cases consistent with the NLRA, as demonstrated *supra* at 4. In *Abood*, 431 U.S. at 223, the Court remarked that "[u]nder Michigan law employees of local government units enjoy rights parallel to those protected under federal legislation. . . and [s]everal aspects of Michigan law [that] mirror provisions of the Railway Labor Act are of particular importance here."

ity of the employees *in a unit appropriate for such purposes*, shall be the exclusive representatives of all the employees *in such unit* for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .[6]

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . .[7]

For the purposes of this section, to bargain collectively is the performance of *the mutual obligation of the employer and the representative of the employees* to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . .[8]

Thus, it could not be clearer: a § 9 (a) representative is selected to represent a particular bargaining unit of employees; the bargaining unit concept is embedded in the statute to insure "employees the fullest freedom in exercising the[ir] rights guaranteed by" the Act, and it is *the* representative and *the* employer that have bargaining obligations under the statute.[9]

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[6] National Labor Relations Act (NLRA) § 9 (a), 29 U.S.C. § 159 (a). (Emphasis added.)

[7] NLRA § 9 (b), 29 U.S.C. § 159 (b).

[8] NLRA, § 8 (d), 29 U.S.C. § 158 (d).

[9] We do not belabor this point in the text, but we would be remiss not to also note that this same bargaining unit-bargaining agent-employer concept is central to the Act's other provisions. In particular, we refer to the election

Similarly, § 17.455(11) of the Michigan PERA, limits the breadth of the labor organization's representation:

> Representatives designated or selected for purposes of collective bargaining by the majority of the public employees in a unit appropriate for such purposes shall be the exclusive representative of all the public employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment.

It is the last clause of the above statute which has drawn the unions to charge for their lobbying activities. As this Court read this language to permit charges for "related" activities in *Abood*, 431 U.S. at 242, *Amicus* respectfully submits that this language was useful to the Court because the complaint's allegations were "general ones...and the parties have neither briefed nor argued the question of what specific union activities in the present context properly fall under the definition of collective bargaining." *Id.* at 236. This case presents the opportunity to draw that line and apply the bargaining unit standard employed under the NLRA and RLA.

B. THE BOARD'S RULES & REGULATIONS

The National Labor Relations Board's Rules and Regulations, as would be expected, adhere to the bargaining unit concept. A partial list of the more significant provisions which do so include:

> A petition for certification, when filed by an employee or group of employees. . .shall contain the following:
> (4) A description of the bargaining unit which the petitioner claims to be appropriate.[10]

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provisions, § 9 (c) (l) (A), 29 U.S.C. § 159 (c) (l) (A); and § 9 (e), 29 U.S.C. § 159 (e).

[10] Rules & Regulations § 102.61 (a).

A petition for certification, when filed by an employer, shall contain the following:
(3) A brief statement setting forth that one or more individuals or labor organizations have presented to the petitioner a claim to be recognized as the exclusive representative of all employees in *the unit claimed to be appropriate; a description of such unit; and the number of employees in the unit.*[11]

A petition for decertification shall contain the following:
(2) The address of the establishment and a description of the bargaining unit involved.[12]

A petition for clarification shall contain the following:
(4) A description of the present bargaining unit and, if the bargaining unit is certified, an identification of the existing certification.[13]

Contents of Petition to rescind authority [under § 9 (e) (1) of the Act].—
(d) A description of the bargaining unit involved.[14]

The Michigan statute, PERA § 17.455(12) sets out a similar rule to entertain a petition for an election: "[b]y a public employer or group of public employees, or an individual or labor organization acting in their behalf, alleging that 30% or more of the public employees within a unit claimed to be appropriate for such purpose."

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[11] Rules & Regulations § 102.61 (b).

[12] Rules & Regulations § 102.61 (c).

[13] Rules & Regulations § 102.61 (d).

[14] Rules & Regulations § 102.84.

The Michigan PERA and the Board's Rules and Regulations, then, confirm the fundamental importance of the bargaining unit concept to the proper administration of the PERA as well as the NLRA.

C. BOARD DECISIONS

Decisions of the Board which are completely grounded on the bargaining unit concept are legion. Indeed, they are so numerous, and the proposition so well understood, that we see no need to exhaustively cite those cases. However, we refer to two cases, arising in the context of a demand for bargaining, that are frequent authorities for the proposition upon which we rely:

> In order to impose a bargaining duty upon an employer, the union's demand should "clearly define the unit for which recognition is sought."[15]
>
> Because of this substantial deviation between the appropriate unit and the unit specified in the. . . bargaining demand, that demand was not a proper request to bargain. . . .[16]

D. SUPREME COURT UNIT STANDARD DECISIONS

The cases arising in this Court confirm that the bargaining unit concept is at the heart of the NLRA:

> Together, these provisions establish the obligation of the employer to bargain collectively, "with respect to wages, hours, and other terms and conditions of employment," with

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[15] *Motown Record Corporation*, 197 N.L.R.B. 1255 (1972) (Chairman Miller & Members Kennedy and Penello).

[16] *Chester Valley, Inc.*, 251 N.L.R.B. 1435 (1980) (Chairman Fanning & Members Jenkins and Truesdale).

"the representatives of his employees" designated or selected by a majority "in a unit appropriate for such purposes." This obligation extends *only to the "terms and conditions of employment" of the employer's "employees" in the "unit appropriate for such purposes" that the union represents.*[17]

Section 9 (b) of the Act vests in the Board authority to determine "the unit appropriate for purposes of collective bargaining." * * * The Board does not exercise this authority aimlessly; in defining bargaining units, its focus is on whether the employees share a "community of interest." * * * A cohesive unit—one relatively free of conflicts of interest—serves the Act's purpose of effective collective bargaining (citing *Pittsburgh Plate Glass*), and prevents a minority interest group from being submerged in an overly large unit (again citing *Pittsburgh Plate Glass*).[18]

E. SUPREME COURT FAIR REPRESENTATION DECISIONS

Beck, supra, confirmed that it is a *per se* violation of the Duty of Fair Representation (DFR) for a union which is the exclusive representative under § (9) (a) of the Act to "exact" or "collect", under the guise of the costs of statutory representation, fees which exceed the costs of collective bargaining, contract administration, and grievance adjustment. In determining the breadth and limits of the DFR, the Court has said:

> Under [the Duty of Fair Representation] the exclusive agent's statutory authority to represent *all members of a designated unit* includes

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17 *NLRB v. Pittsburgh Plate Glass*, 404 U.S. 157, 164 (1971).

18 *NLRB v. Action Automotive*, 469 U.S. 490, 494 (1985).

> a statutory obligation to serve the interests of all [unit] members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.[19]
>
> Their [bargaining representatives'] statutory obligation *to represent all members of an appropriate unit* requires them to make an honest effort to serve the interests of all of those members, without hostility to any.[20]
>
> The exclusive agent's obligation to "represent all members of an appropriate unit requires [it] to make an honest effort to serve the interests of all those members, without hostility to any." *** [A]nd its powers are "subject always to complete good faith and honesty of purpose in the exercise of its discretion."[21]

The statutory duty of fair representation, which provides the justification for the agency shop, "extends not only to the negotiation of the collective bargaining agreement itself, but also to the subsequent enforcement of *that* agreement, including the administration of any grievance procedure *the* agreement may establish." *Beck*, 108 S. Ct. at 2645 (emphasis added).

And, pertinent to this discussion, the Court has said in an anti-trust case:

> [T]here is nothing in the labor policy [of the United States] indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours, and work-

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19 *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). (Emphasis added.)

20 *Ford Motor Company v. Huffman*, 345 U.S. 330, 337 (1953).

21 *Humphrey v. Moore*, 375 U.S. 335, 342 (1964).

ing conditions of other bargaining units or to attempt to settle those matters for the entire industry. On the contrary, *the duty to bargain unit by unit* leads to a quite different conclusion. The union's obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation as the individual circumstances might warrant without being straight-jacketed by some prior agreement with the favored employers.[22]

F. UNION DEFENSE OF DFR LAWSUITS

We understand the union-respondents in the instant case to claim that they can charge employees in a given bargaining unit for their costs of negotiating and enforcing bargaining agreements in other units. This position is, in principle, precisely contrary to the positions taken by labor organizations in defending DFR cases. In such cases they argue—and successfully—that if they are not the exclusive representative there is no DFR liability. In responding to such arguments, the courts have said;

> The scope of the duty of fair representation is coextensive only with the union's statutory authority to act as the exclusive representative of all employees within the bargaining unit. If a union does not serve as the exclusive agent

[22] *United Mine Workers v. Pennington*, 381 U.S. 657, 666 (1965).

> for the members of the bargaining unit with respect to a particular matter, there is no corresponding duty of fair representation.[23]
>
> The duty of fair representation was created by the federal courts, but it only applies to labor organizations, by virtue of their status as the exclusive bargaining representative of individual workers.[24]

In a case defended on the basis that the labor organization is not the exclusive representative, the court concluded:

> The district court determined there was uncontroverted evidence the International was not a party to the collective bargaining agreement and that the agreement recognized only the employees' local union. * * * For this reason, the court held there was no basis for imposing liability on the International premised on breach of a statutory duty of fair representation.[25]

In cases defended on the basis that the labor organization was not the exclusive representative for that kind of activity, the courts have concluded:

> ALPA owed plaintiff no duty of representation before the FAA, nor did its assistance to the FAA prevent plaintiff from procuring independent representation or representing himself before the FAA. Thus the exclusivity factor is absent. * * * Thus the Court can find no

[23] *Barrett v. Ebasco Constructors*, 868 F.2d 170, 171 (5th Cir. 1989).

[24] *Allied Mechanical Contractors v. Industrial Relations Council*, 685 F. Supp. 552, 565 (W.D. N.C. 1988).

[25] *Tongay v. Kroeger Co.*, 860 F.2d 298, 299 (8th Cir. 1988).

> rationale that would justify application of the doctrine of fair representation to the facts alleged by plaintiff.[26]
>
> It will be observed that the [Supreme] Court, in the case creating the duty of fair representation, repeatedly rooted that duty in the powers conferred upon the union by the statute, the powers belonging to the union as exclusive representative. The duty was thus co-extensive with the power; the duty is certainly not narrower than the power, and this formulation indicates that it is also not broader.[27]

Thus, it is readily seen that unions which are exclusive representatives want "to have their cake and eat it too." On the one hand, they demand (unlawfully) representation fees to defray costs for bargaining units and activities for which they are not the exclusive representative of the individual employees' upon whom the demand is made. On the other hand, they defend DFR suits by reference to the well-understood principle that DFR is coterminous with the exclusive representative's authority under the Act to be the collective bargaining agent for a particular unit of employees.

G. THE COURT'S *ELLIS* DECISION

But all of this discussion about a § 9 (a) representative's general powers should be unnecessary and redundant in the *Beck* context. The Court has already concluded that the bargaining unit standard of chargeability is correct. It did so in the case of

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[26] *Florey v. ALPA*, 439 F. Supp. 165, 170 (D. Minn. 1977).

[27] *NTEU v. FLRA*, 800 F.2d 1165, 1169 (D.C. Cir. 1986) (Public-sector exclusive representative has no duty to provide attorneys to represent employees in discharge hearings not provided by the collective bargaining agreement. Court concludes that public-and private-sector DFR is the same). *Accord*, *AFGE v. FLRA*, 812 F.2d 1326 (10th Cir. 1987).

Ellis v. BRAC, 466 U.S. 435 (1984). There, the Court addressed and resolved the issue for that and other cases. No valid reason exists to reconsider this issue in this case.[28] In *Ellis*, the Court has said:

> [T]he test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of *the* employees in dealing with *the* employer on labor-management issues.[29]
>
> [W]here a union shop provision is in place and enforced, all employees in the relevant unit are already organized. By definition, therefore, organizing expenses are spent on employees outside the collective-bargaining unit already represented. Using dues exacted from an objecting employee to recruit members among workers outside the bargaining unit can afford only the most attenuated benefits to collective bargaining on behalf of the dues payer.[30]
>
> The expenses of litigation not having such a connection with the bargaining unit *are not to be charged to objecting employees.* * * * [U]nless the Western Airlines bargaining unit is *directly concerned*, objecting employees need not share the costs of the union's challenge. . . .[31]

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[28] *Beck*, at 2657, cites *Ellis* with approval on this point.

[29] *Ellis* at 448. (Emphasis added.)

[30] *Ellis* at 452. Union organizing was ruled nonchargeable in the case. *Ellis* at n. 11.

[31] *Ellis* at 453.

H. DISCLOSURE STANDARD

It is clear under the Court's decision in *Chicago Teachers v. Hudson*, 475 U.S. 292 (1986), and the Board General Counsel's Memorandum GC-88-14, which adopts *Hudson*, that, "[b]asic considerations of fairness . . . dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee."[32] Where payments are made "to affiliated state and national labor organizations . . . either a showing that none of it was used to subsidize activities for which nonmembers may not be charged, or an explanation of the share that was so used was surely required."[33] No matter what level of the union lays claim to a portion of the fee, the goal of *Hudson* disclosure is "adequate disclosure [which] surely would include the major categories of expenses, as well as verification by an independent auditor."[34]

Certainly there is no basis for requiring less from the organization, or part of an organization, claiming the fee than the exclusive representative must provide. Indeed, under the statutory construct considered above, only the § 9 (a) representative is entitled to a fee under § 8 (a) (3). (A 9(a)'s affiliate *might*, theoretically, be entitled to claim some fee, to the extent that it can affirmatively show, in its audited financial disclosure, that it has actually expended funds to *directly* support the negotiation or administration of *the particular collective bargaining agreement*) It is by virtue of that status, and the statutory functions that are presumably performed in some measure, that the fee can be justified at all. If, through some incapability on its part to perform statutory duties, the exclusive representative subcontracts for those services, at least the same disclosure is required as if it had performed those services itself. If that were not true, the § 9 (a) representative could merely avoid the disclosure requirements that are a condition of its entitlement to

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32 *Hudson* at 306.

33 *Hudson* at n. 18.

34 *Hudson* at n. 18.

receipt of financial core dues, merely by subletting all of those services and denying disclosure on the theory that the other organization is not the § 9 (a) representative. Such a subterfuge cannot be legitimate and militates against adoption of some lesser disclosure by organizations claiming financial core fees which are nor the § 9(a) representative.

CONCLUSION

The authorities cited by *Amicus* establish two principles of importance to the inquiry that this Court must consider in resolving the instant case. First, the legitimate costs pool for the exclusive representative's charge to nonmembers is the bargaining unit for which the charge is being levied. Second, the audited financial disclosure made by affiliates of the exclusive representative to justify the financial core fee must be as detailed and complete as those made by the exclusive representative. Any other results, on these points, would ignore the statutory and constitutionally based limitations and the uniform application, by the Board and the courts; the contours of the Duty of Fair Representation as limited by the exclusive representative's exclusivity status; the standard of chargeability determined in *Ellis* and the disclosure requirements of *Hudson*.

WHEREFORE, for the foregoing reasons, *Amicus Curiae* Center on National Labor Policy respectfully submits that the judgment of the United States Court of Appeals for the Sixth Circuit should be reversed and remanded.

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No. 89-1217

In The

Supreme Court of the United States

October Term, 1990

JAMES P. LEHNERT, et al.,

Petitioners,

v.

THE FERRIS FACULTY ASSOCIATION-MEA-NEA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICUS CURIAE LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Amicus Landmark Legal Foundation is a not-for-profit public interest law foundation committed to preserving the principles of limited government, free enterprise, federalism, separation of powers, strict construction of the United States Constitution and individual rights. The Foundation, through original action litigation and amicus curiae briefs, has fervently supported the right of individuals to freely exercise their

First Amendment beliefs to support or oppose the political philosophy of their choice. Moreover, the Foundation has strenuously opposed state and federal governmental restrictions on and hindrances to the free enterprise system and the economic rights of individuals.

Landmark has appeared as amicus curiae before this Court in a number of cases involving a broad range of public interest issues. Landmark submits this brief to assist the Court in its deliberations on the significant personal and economic liberty questions presented by this case.

SUMMARY OF ARGUMENT

Significant infringement of the First Amendment rights of dissenting non-union members of union-shop collective bargaining units has been countenanced by this Court in the name of industrial peace. The degree of infringement, however, is limited to requiring dissenting non-union members to funding expenditures reasonably or necessarily related to the agent's responsibilities as the exclusive representative of the employees in the bargaining unit in dealing with the employer – even though the non-union employee chooses not to be a member of the union. This Court has not until now been presented the opportunity to clearly define what union activities are reasonably and necessarily related to the responsibilities of an exclusive bargaining agent in dealing with an employer.

Public employees may not constitutionally be compelled to subsidize the political ideology of their union

representative, nor should they be forced to fund the general day-to-day operations of the union with which they have chosen not to associate. A labor union which, pursuant to state statute, compels non-union workers to financially support its political activities and other general activities unrelated to its responsibility as exclusive bargaining agent burdens the free speech and association rights of those non-union workers.

Employees in the Ferris State College faculty bargaining unit who chose not to join the union have been forced to pay for activities which include lobbying in the state legislature, electioneering, organizing, and public relations, for expenses related to other bargaining units and for expenses related to preparation for illegal strikes. These expenses are not reasonably or necessarily related to the union's responsibilities as exclusive bargaining agent on behalf of the Ferris faculty unit. Therefore, this Court should hold that these expenditures are not constitutionally chargeable to dissenting non-union members of the bargaining group.

ARGUMENT

I.

THE SIXTH CIRCUIT COURT OF APPEALS ERRED IN PERMITTING UNIONS TO EXACT DUES FROM DISSENTING NON-UNION MEMBERS OF A CLOSED SHOP BARGAINING UNIT TO PAY EXPENSES UNRELATED TO BARGAINING UNIT NEGOTIATIONS OR CONTRACT ADMINISTRATION.

With the Sixth Circuit's decision in this case in their arsenals, bargaining agents will now have unfettered

power to force dissenting non-union members of union shop bargaining units to subsidize the unions' organizational and political agendas. Far from merely protecting unions from "free-riders," the lower court's decision instead compounds an already significant infringement on the First Amendment rights to free speech and association of dissenting non-union members in union-shop bargaining units. The applicable precedent of this Court is stretched far beyond reason by the Circuit Court's analysis in approving the chargeability to dissenting non-union members of expenses not reasonably or necessarily related to the unions' responsibilities as the exclusive representative of the employees in the bargaining unit in dealing with the employer.

A. *Abood* And *Ellis* Limit Constitutionally Chargeable Expenses To Those Reasonably Employed To Implement Or Effectuate The Duties Of The Union As Exclusive Representative Of The Employees In The Bargaining Unit.

This Court's decisions "establish with unmistakeable clarity that the freedom of the individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments." *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 233 (1977) (citations omitted). The government may not prevent a person from associating with a particular group or force an individual to join a particular group. "The right to be free from compelled associations is found in our conviction that individuals may not be forced to join or support positions

or views which they find objectionable on moral, ideological, or personal grounds." *Minnesota State Bd. For Community Colleges v. Knight*, 465 U.S. 271, 297 (1984) (Brennan, J., dissenting).

"Equally clear is the proposition that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment." *Abood*, 431 U.S. at 234. Accordingly, this Court held that dissenting non-member employees may constitutionally prevent a union from spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative. *Id.*

While recognizing that differences in the nature of public employment and private employment do exist, this Court in *Abood* found that those differences "simply do not translate into differences in First Amendment rights." *Id.* at 232. Therefore, even though the line between what expenditures may or may not constitutionally be chargeable might be "hazier" in the public employment sector, *id.* at 236, there exists no justification for tolerating a greater infringement of a dissenting non-union public employee's First Amendment protections. The Circuit Court's decision, however, ignores the principles set forth in *Abood* in favor of a standard which is both unreasonable and constitutionally infirm.

The focus in all cases clearly must be on the relation of union activities to the collective bargaining unit. *Id.* Public employees may not constitutionally be compelled

to subsidize the political ideology of their union representative under the guise of an agency shop arrangement. *Id.* at 235-236.

The test for the constitutional chargeability of expenses to dissenting non-members is whether the challenged expenses are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of employees *in dealing with the employer as an exclusive representative on labor-management issues. Ellis v. Railway Clerks*, 466 U.S. 435, 448 (1984) (emphasis added). It necessarily follows, therefore, that activities beyond those dealing directly with the employer as an exclusive representative on labor management issues, in order to constitutionally be chargeable, must also be necessarily or reasonably incurred on behalf of the bargaining unit in its relationship with the employer. In no instance, however, may dissenting non-union members constitutionally be compelled to subsidize the political ideology of their union representative under the guise of an agency shop arrangement. *Ellis*, 466 U.S. at 447; *Abood*, 431 U.S. at 235-236.

This Court recognized in *Abood* and *Ellis* that, by even allowing the union shop, a significant impingement on dissenting non-union members' First Amendment rights has been countenanced. *Ellis*, 466 U.S. at 455; *Abood*, 431 U.S. at 222. The limiting nature of those decisions protects dissenting non-union employees from further, unjustified deprivation. By allowing expenditures not related to the exclusive representation of the employee in dealing with the employer, however, the decision below destroys the integrity of those protections.

B. The Decision Below Places No Meaningful Limit On The Power Of Unions To Force Dissenting Non-Members To Subsidize Political Activity In Violation Of Their First Amendment Rights.

Any union activity will arguably and ultimately have some bearing on collective bargaining efforts by a union representative on behalf of a bargaining unit. Its business practices, charitable endeavors and political activities – all ultimately affect the negotiating effectiveness of a bargaining agent. However, not all of these activities may constitutionally be charged to non-union members of a union shop bargaining unit. The relationship each activity has to actual bargaining efforts and agreement administration is what determines the constitutional chargeability of an activity to a dissenting non-member employee. *See Ellis*, 466 U.S. at 455. The standard under *Ellis* is that the relationship must be significant. The Sixth Circuit's standard in this case, however, is that the relationship need only be *de minimus*. *See Lehnert v. Ferris Faculty Association*, 881 F.2d 1388, 1394 (Merritt, J., concurring in part, dissenting in part).

The Court of Appeals sanctioned the chargeability of expenditures which included union lobbying in the state legislatures; union activities in state and local elections involving candidates and issues; organizing, public relations and other activities relating to teacher bargaining units in schools other than Ferris State College; general public relations activities at the state and national levels; and, perhaps most remarkably, the union's preparation for an illegal strike at Ferris State College – a strike which the dissenting faculty opposed. *See id.* The only such expenses actually incurred by the bargaining agent

directly relating to negotiations on behalf of the bargaining unit were those related to preparation for an illegal strike. Preparation for illegal activities surely was not contemplated as necessary or reasonable by this Court under the *Ellis* test.

As Judge Merritt illustrated so clearly in his dissent below, "dissenters should not be forced to pay the expenses for planning an unlawful act." *Id.* at 1396. Respondents suggest that because no strike actually occurred dissenting non-union members of the bargaining unit should have no constitutional objection to subsidizing efforts merely to threaten illegal activity. Threatening illegal activity, however, precisely illustrates the kind of unreasonable, unnecessary and unconscionable activity that dissenting non-union members of bargaining units seek to *dis*-associate themselves from by not joining the union. It is an outrage to suggest that dissenters ought to have to pay for that which they find morally repulsive. In no way do such expenditures satisfy the standards of *Ellis*.

The remaining expenditures approved below can only be described as general, undifferentiated costs of lobbying the legislature and other day-to-day union operations not related to the Ferris State College bargaining unit. *See id.* at 1394-1395. In rationalizing those costs, the Court of Appeals erroneously extends *Abood* and *Ellis* at the expense of dissenting non-union members' further weakened First Amendment rights.

To justify these additional infringements, the Circuit Court disregarded well-settled principles of constitutional law. Any governmental deprivation of an individual's constitutional rights must first be justified by a

compelling governmental interest and, in this case, must be able to stand up to the strict First Amendment scrutiny. The Sixth Circuit abandons these fundamental principles by requiring only the most casual connection between union activities and the bargaining unit in permitting the chargeability of expenditures to dissenting non-union members of the bargaining unit.

II.

THIS COURT SHOULD STRICTLY LIMIT UNION ACTIVITIES WHICH CONSTITUTIONALLY CAN BE FINANCED FROM DISSENTING NON-UNION MEMBER EMPLOYEES' SERVICE FEES TO THOSE REASONABLY AND DEMONSTRABLY EMPLOYED TO IMPLEMENT OR EFFECTUATE THE DUTIES OF THE UNION AS EXCLUSIVE REPRESENTATIVE OF THE EMPLOYEES IN THE BARGAINING UNIT.

The scope of expenditures that may constitutionally be chargeable to dissenting non-union member employees has been greatly expanded by the standard set forth by the Sixth Circuit Court of Appeals in this case. The lower court's decision leaves dissenting non-members no alternative but to subsidize the political ideology and activism of their bargaining agent. Compelled subsidization of political ideology is a clear violation of the First Amendment, a violation which goes to the very heart of this constitutional safeguard. In *Abood*, "[this] Court acknowledged Thomas Jefferson's view that 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical'." *Keller v. State Bar of California*, 58 U.S.L.W. 4661, 4663 (U.S. June 4, 1990) (quoting *Abood*,

supra, 431 U.S. at 234-235, n.31). It is also unconstitutional.

One group may not, with the authority of a state statute, coerce another group into financing its political beliefs, convictions or activities. Unions may not, therefore, constitutionally use agency fees for political activities over the objections of non-union employees. Further, unions may not constitutionally use agency fees to subsidize their organizational expenses and activities over the objections of non-union employees.

It is well established that non-union members of a bargaining unit may only constitutionally be charged for expenditures of the bargaining agent necessarily and reasonably incurred in the negotiation and administration of contracts with the bargaining unit. *Ellis*, 466 U.S. at 448. This Court has not until now, however, been presented with a case in which it could reach the "difficult line drawing questions," *Abood*, 451 U.S. at 236, between collective bargaining activities for which contribution can be compelled and activities unrelated to the collective bargaining process. *Id.* An important opportunity to maintain the integrity of individual First Amendment rights is now before this Court. The line must clearly be drawn at expenditures reasonably, necessarily and demonstrably employed for the direct implementation or effectuation of the duties of the union as exclusive representative *of the employees in the bargaining unit*. As pointed out by Judge Merritt's dissent below, "*Ellis* establishes the clear principle that the union expenses charged in a closed shop must relate closely to the activities of the bargaining unit of the dissenting members. The general political, lobbying, public relations and organizing activities of the NEA

and its state affiliate [in this case] obviously have no such relationship [to the Ferris faculty bargaining unit]." *Lehnert, supra*, 881 F.2d at 1395. (Merritt, concurring in part, dissenting in part).

The First Amendment free speech and association protections guaranteed the dissenting non-union members of the Ferris faculty collective-bargaining unit – and similarly situated individuals in collective-bargaining units throughout this workforce – have been dramatically and unjustifiably diminished by the Circuit Court's decision in this case.

CONCLUSION

For the foregoing reasons, the decision of the Sixth Circuit should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1217

JAMES P. LEHNERT, *et al.*,
Petitioners,

v.

THE FERRIS FACULTY ASSOCIATION-MEA-NEA, *et al.*,
Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES COUNCILS 1, 52, 71, 73, COMMUNICATIONS WORKERS OF AMERICA, NEW JERSEY STATE FEDERATION OF TEACHERS, AND RUTGERS COUNCIL OF A.A.U.P. CHAPTERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

This brief *amici curiae* is filed with the consent of the parties as provided for in this Court's Rules.

INTEREST OF THE *AMICI CURIAE*

American Federation of State, County and Municipal Employees Councils 1, 52, 71 and 73 represent 25,000 public employees in New Jersey, 9,000 of whom are employed by the State government. The Communications Workers of America represents 55,000 public employees in New Jersey, 40,000 of whom are employed by the State government. The New Jersey Federation of Teachers has forty-seven local affiliates, which represent 8,000

public employees, most of whom are employed by local school systems. The Rutgers Council of A.A.U.P. Chapters represents 5,000 faculty members and librarians employed at the New Brunswick, Newark and Camden, New Jersey campuses of Rutgers University.

Each of these labor organizations has negotiated representation fee agreements, and each uses a portion of the funds so collected to engage in the employment-related lobbying expressly provided for by the New Jersey Employer-Employee Relations Act. The organizations engage in this lobbying because they believe that it is necessary to participate in the legislative and regulatory processes in order to effectively perform their roles as employee representatives. Because one of the issues in this case concerns the constitutionality of statutes such as N.J.S.A. 34:13A-5.5, which authorize the use of representation fees to support employment-related lobbying, the above New Jersey labor organizations file this brief addressed to this issue.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court of Appeals, in considering and rejecting the objecting employees' constitutional challenge to the Ferris Faculty Association's charge to all the employees the Association represents of the costs of the Association's "Preserve Public Education Program", began from the following premise:

> To represent their members effectively, public sector unions must necessarily concern themselves not only with negotiations at the bargaining table but also with advancing their members' interest in [the] legislative . . . arena[] . . . . We therefore agree with the opinion of the Third Circuit in *Robinson v. State of New Jersey*, 741 F.2d 598 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985), and hold that lobbying . . . by a public employee union that [is] "pertinent to the duties of the union as a bargaining representative" may be constitutionally charged to dissenting employees. 741 F.2d at 609. [Pet. App. 7a.]

The argument that follows is devoted to demonstrating that the court below was entirely correct in this regard.

The Michigan Legislature, in the statute under review here, has provided that certain terms and conditions of public employment are to be settled through collective bargaining where a group of employees choose an exclusive representative to bargain on their behalf with their employer. *See Abood v. Detroit Board of Education*, 431 U.S. 209, 223-224 (1977) (discussing the Michigan statute). While in theory such legislation could provide that all terms and conditions of employment are to be decided through that process, so far as we are aware such a far-reaching approach has never been attempted. Instead, in the public sector, as in the private sector, public law establishes many of the basic employment conditions. *Compare, e.g., Ft. Halifax Packing Co. v. Coyne*, 481 U.S. 1, 19-23 (1987) (in the private sector, state laws establish minimum substantive labor standards).

State legislatures have, in other words, been reluctant to allow the Executive Branch, acting as the public employer, to set all terms and conditions of public employment unilaterally or through collective bargaining. *See, e.g.*, Edwards, Clark and Craver, *Labor Relations Law in the Public Sector*, 293-407 (3d ed. 1985) (collecting relevant materials). And, it is, of course, for the legislature to decide whether any given matter will be settled through a process in which the legislature itself, and hence the public, has an active role or through a process such as collective bargaining in which the legislature and the public do not play such a role. *See Minnesota Board for Community Colleges v. Knight*, 465 U.S. 271, 285 (1984) ("However wise or practicable various levels of public participation in various kinds of policy decisions may be, this Court has never held, and nothing in the Constitution suggests it should hold, that government must provide for such participation").

The New Jersey Legislature and the State Supreme Court have given particularly explicit, detailed and ma-

ture consideration to the balance between legislative decisionmaking with respect to the substance of the public employee-public employer relationship on the one hand, and collective bargaining decisionmaking on the other. Most to the point here, New Jersey has made it plain that the State's program for public sector industrial peace is in evolution and that the Legislative Branch is committed to an active and continuing role in framing and reframing that program. New Jersey has also recognized that the Legislature needs the active participation in its deliberations not only of the citizenry at large but of both the Executive Branch, as the employer, and of public employees through their majority representatives.

The foundation of the State's program for industrial peace, in other words, is legislative action to perfect the current labor-management rules that is the product of a process of discussion that includes both the Executive Branch and majority employee representatives. In this regard, the New Jersey statute expressly provides that where a "representation share fee" agreement is in force, union lobbying on employment matters *is* chargeable to all represented employees. This provision has been upheld against constitutional challenges in thoughtful opinions by both the Third Circuit and the State Supreme Court. *See Boonton Bd. of Ed. v. Kramer*, 99 N.J. 523, 494 A.2d 279, 285-292 (1985), *cert. denied*, 475 U.S. 1070 (1986); *Robinson v. New Jersey*, 741 F.2d 598, 604-610 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985).

The decisions of the Third Circuit and the New Jersey Supreme Court with respect to the use of representation fees for employment-related lobbying are fully in accord with this Court's recent decision in *Keller v. State Bar of California*, —— U.S. ——, 110 S.Ct. 2237 (1990), addressed to the use of compulsory bar association dues for lobbying. In *Keller*, the Court held that all attorneys may be required to provide financial support to "those State Bar activities in which the officials and members

of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession. . . ." *Id.* at 2237.

The state purpose in establishing such a requirement "is for recommendations as to admission to practice, the disciplining of lawyers, codes of conduct, and the like to be made to the courts or the legislature by the organized bar that are in the nature of specialized professional advice to those with the ultimate responsibility of governing the legal profession." *Id.* at 2235. Required bar dues, the Court added, may *not* be used, however, to support "activities having political or ideological coloration which are not reasonably related to the advancement of such goals. . . ." *Id.* at 2237.

Under *Keller* then, there is *no* constitutional barrier to a state's decision that members of a certain occupational group must financially support an association charged with advising the state on the regulations governing the occupation.

As we have noted, it is common for state legislatures to divide "the ultimate responsibility of governing" the terms and conditions of public employment between the Executive Branch and the Legislative Branch. While most of the executive decisions in this regard are typically assigned to the process of collective bargaining, many important decisions are frequently reserved to the legislature or to executive decisionmaking outside the bargaining process. With respect to those employment decisions excluded from bargaining, the state interest in seeing that those with "ultimate responsibility" for deciding such matters receive "specialized professional advice" on the employees' interests from their chosen representative is as great as the interest *Keller* identifies in hearing from the state bar association on matters concerning governance of the legal profession.

As we now demonstrate, the New Jersey Supreme Court's *Boonton* analysis, buttressing as it does the judgment of the New Jersey Legislature with respect to the

best ordering of the State's labor relations, makes a particularly cogent showing of what the state interest in permitting public sector unions to charge all represented employees for the cost of employment-related lobbying consists of and why that interest overrides the constitutional claims of objecting employees such as the one made here. In what follows, we therefore carefully trace the teachings of the New Jersey Supreme Court with respect to the operation of that State's labor relations system.

In part 1 of the argument that follows we discuss the New Jersey law governing representation fee agreements in that State's public sector. Pp. 6-8, *infra*. In part 2, we describe in some detail the public sector labor relations system established by the New Jersey legislature. Pp. 8-20, *infra*. In part 3, we discuss the State's interest in permitting unions to use representation fees to finance employment-related lobbying. Pp. 20-28, *infra*. Finally, in point 4 we show that New Jersey's decision to allow the use of representation fees for such lobbying is constitutional. Pp. 28-30, *infra*.

ARGUMENT

I. THE NEW JERSEY LAW ON "REPRESENTATION FEE" AGREEMENTS IN THE PUBLIC SECTOR.

Section 5.5a of the New Jersey Public Employer-Employee Relations Act allows a public employer and the union chosen as the majority representative by a unit of employees to include in their collective agreement a requirement that each nonmember employee in the unit pay "a representation fee in lieu of dues for services rendered by the majority representative." N.J.S.A. 34:13A-5.5a.

This representation fee may not exceed 85 percent of regular membership dues, may not include any costs of member-only benefits, and may not be based on "the employee's additional pro rata share of expenditures by the majority representative that is . . . in aid of activities or

causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment. . . ." N.J.S.A. 34:13A-5.5b&c. Equally to the point here, the New Jersey statute expressly provides that

> . . . the cost of support of lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours and other conditions of employment in addition to those secured through collective negotiations with the public employer are chargeable to all employees in the bargaining unit. [N.J.S.A. 34:13A-5.5c.]

Both the New Jersey Supreme Court and the United States Court of Appeals for the Third Circuit have upheld this limited authorization to charge for lobbying activities against First Amendment challenges. *Boonton Board of Education v. Kramer*, 99 N.J. 523, 494 A.2d 179, 285-292 (1985), *cert. denied*, 475 U.S. 1070 (1986); *Robinson v. New Jersey*, 741 F.2d 598, 604-610 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985). The New Jersey Supreme Court held that the authorization for certain lobbying charges is constitutional "since it furthers the state's sgnificant interest in public-employment stability without encroaching impermissibly on the rights of free speech and association. . . ." 494 A.2d at 548. In this regard, the New Jersey Court explained:

> The statute's broad recognition of lobbying activities as an essential element of public employee union activity accurately reflects the significant quantum of public employee rights and benefits that are determined outside the collective-negotiation process. Public employees in New Jersey are substantially affected by state and local budgetary decisions and by the various laws and regulations that determine conditions of employment as much as, if not more than, by the negotiations conducted by their majority representative. Indeed, many of the most important benefits of public employment are determined

by statute and a public employee union that ignored this reality would not represent properly the member and nonmembers in its bargaining unit. [*Id.* at 290-291.] [1]

II. THE NEW JERSEY PUBLIC SECTOR LABOR RELATIONS SYSTEM.

The essence of New Jersey's public sector labor relations system is set out in the New Jersey Employer-Employee Relations Act, enacted in 1968. But the provisions of that statute can only be fully understood against the backdrop of rights provided to public employees by the New Jersey Constitution adopted in 1947. As the New Jersey Supreme Court has put it, "[t]he ultimate touchstone for any analysis of public employment labor relations in this state is Art. I, par. 19 of the New Jersey Constitution of 1947. . . ." *Red Bank Regional Education Ass'n v. Red Bank Bd. of Ed.*, 78 N.J. 122, 393 A.2d 267, 272 (1978).

Article I, paragraph 19 of the New Jersey Constitution provides:

> Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions, their grievances and proposals through representatives of their own choosing.

This constitutional provision imposes on an employer in the public sector "the duty to meet with its employees or

[1] In a decision that preceded *Boonton Board of Education v. Kramer, supra*, the Third Circuit reached the same conclusion with respect to the relationship between lobbying and collective bargaining in the New Jersey public sector:

> For New Jersey public employees, collective bargaining is inextricably intertwined with legislative change. An examination of the mechanics of New Jersey's public employee collective bargaining agreements reveals the large extent to which the standard terms and conditions of employment under the NLRA or the RLA are governed by state statute or regulation. [*Robinson v. New Jersey, supra*, 741 F.2d at 609.]

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their chosen representative and to consider in good faith any grievance or proposals presented on their behalf." *Lullo v. Fire Fighters Local 1066*, 55 N.J. 409, 262 A.2d 681, 684 (1970). This right of public employees is in addition to their right as citizens to petition the government. "New Jersey public employees possess a constitutional right by virtue of their governmental employment which they would not otherwise possess as citizens—the right to compel government, in its capacity as their employer, to sit down and listen to their grievances and proposals." *Twp. of West Windsor v. PERC*, 78 N.J. 98, 393 A.2d 255, 262 (1978).

The New Jersey Employer-Employee Relations Act, in turn, "extended [to public employees] rights of collective representation more nearly approximating those enjoyed by private sector employees than had been the case when their sole source of organization rights was *N.J. Const.* (1947), Art. I, para. 19." *State v. State Supervisory Employees Ass'n*, 78 N.J. 54, 393 A.2d 233, 239 (1978). The centerpiece of this Act is section 5.3, which provides:

> Representatives designated or selected by public employees for the purposes of collective negotiation by the majority of the employees in a unit appropriate for such purposes . . . shall be the exclusive representative for collective negotiation concerning the terms and conditions of employment of the employees in such unit. [N.J.S.A. 34:13A-5.3.]

That section further provides:

> Proposed new rules or modification of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes and other terms and conditions of employment. [*Id.*]

A union chosen as the majority representative under the Employer-Employee Relations Act assumes an official

status as the employees' representative for more than the "collective negotiations" defined by the statute. The New Jersey Supreme Court has found in the statute a legislative intent "that a majority representative be considered as the 'representative[] of the [unit employees'] own choosing' under Art. I, para. 19 [of the New Jersey Constitution] with respect to grievance presentation as well." *Red Bank Regional Ed. Ass'n v. Red Bank Bd. of Ed., supra*, 393 A.2d at 273.

The New Jersey Supreme Court has identified three purposes served by the statutory system of exclusive representation, in addition to furthering the "basic right[]," accorded public employees by the New Jersey Constitution, "to organize, present and make known to their public employers their grievances and proposals through representatives of their own choosing." *Lullo v. Fire Fighters Local 1066, supra*, 262 A.2d at 684.

First, the New Jersey Commission Report that led to the passage of the Employer-Employee Relations Act states unequivocally that "the public interest requires that public employers and public employees be provided with an effective procedure for the mutual resolution of disputes involving terms and conditions of employment." *Lullo v. Fire Fighters Local 1066, supra*, 262 A.2d at 685 (quoting Final Report to the Governor and the Legislature of the Public and School Employees Grievance Procedure Study Commission). The Legislature determined that exclusive representation was essential to any "effective procedure" for the resolution of labor disputes:

> The purpose was to discourage rivalries among individual employees and employee groups and to avoid the diffusion of negotiating strength which results from multiple representation. On the positive side the Legislature was seeking through the medium of the collective agreement to supersede separate agreements with employees and to substitute a single compact with terms which reflect the strength, negotiating power and welfare of the group. [*Id.* at 692.]

Second, the Legislature determined that public employees "have a legitimate need for a special means of access to government in its capacity as an employer with respect to problems and concerns arising from and affecting th[e] [employment] relationship." *Twp. of West Windsor v. PERC, supra*, 393 A.2d at 262. "[S]uch preferred access is necessary because of the fact that the political interests of the voting public, both as taxpayers and users of public services, are inherently adverse to the employment interests of public employees in better pay and working conditions." *Id.* To meet this need, New Jersey law grants public employees "preferred access to the governmental employer," which results in an "enhancement of the effectiveness of their voice in governmental decision-making" on terms and conditions of employment. *Id.* at 262-263.

Finally, the Legislature was concerned that an individual employee would "view[] the potential consequences of presenting a grievance in his own name with great trepidation. . . ." *Red Bank Regional Ed. Ass'n v. Red Bank Regional Bd. of Ed., supra*, 393 A.2d at 275. To relieve an individual of having "to put himself on the line" in order to have his employment interests made known, the State law gives employees the right to speak on these matters through representatives. *Id.*

A. "Collective Negotiation" Within the New Jersey System.

"Collective negotiation" under the New Jersey statute is not synonymous with "collective bargaining" as is practiced in the private sector. As the New Jersey Supreme Court has explained, "the authorization for 'collective negotiations' in the 1968 Act was designed to make know that there are salient differences between public and private employment relations which necessarily affect the characteristics of collective bargaining in the public sector." *Lullo v. Fire Fighters Local 1066, supra*, 262 A.2d at 698. There are "significant differences between N.J.S.A. 34:13A-5.3, which grants a right to 'col-

lective negotiations,' and 29 U.S.C. § 157, which grants a right to 'collective bargaining.'" *Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed.*, 78 N.J. 144, 393 A.2d 278, 285 (1978).

(i) The scope of "collective negotiations" under the New Jersey statute is defined as follows:

> [N]egotiable terms and conditions of employment are those matters which intimately and directly affect the work and welfare of public employees and on which negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy. [*State v. State Supervisory Employees Ass'n, supra*, 393 A.2d at 239.]

Under this definition, "[p]ublic employment negotiation in New Jersey has divided into two distinct categories: matters that are nonnegotiable because they involve governmental policy and 'mandatorily negotiable terms and conditions of employment.'" *New Jersey State College Locals v. State Board of Higher Ed.*, 91 N.J. 18, 449 A.2d 1244, 1250 (1982).

In general, there are no "permissive" subjects of negotiation in the New Jersey public sector. *Id.* at 1250. n.4. *Compare Ridgefield Park Ed. Ass'n v. Ridgefield Bd. of Ed.*, 78 N.J. 144, 393 A.2d 278, 287 (1978), *with NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).[2]

Thus, if a term or condition of employment involves "governmental policy," the public employer is *precluded* from negotiating about that term or condition.

(ii) In the New Jersey public sector, moreover, statutes and regulations that set terms and conditions of

[2] By an amendment to the Act, the New Jersey legislature created a limited "permissive" category of negotiation with respect to bargaining by police and firemen. *See Woodstown-Pilesgrove Bd. of Ed. v. Woodstown-Pilesgrove Ed. Ass'n*, 81 N.J. 582, 410 A.2d 1131, 1134 n.1 (1980).

employment normally limit the scope of collective negotiations rather than, as is frequently true in the private sector, merely stating minima that can be supplemented in collective bargaining:

> [S]pecific statutes or regulations which expressly set particular terms and conditions of employment . . . for public employees may not be contravened by negotiated agreement. For that reason, negotiation over matters so set by statutes or regulations is not permissible. [*State v. State Supervisory Employees Ass'n, supra*, 393 A.2d at 246.]

On the other hand, New Jersey statutes and regulations setting terms and conditions of employment become an *integral part of the negotiated collective agreement* covering affected employees:

> All such statutes and regulations which are applicable to the employees whose comprise a particular unit are effectively incorporated by reference as terms of any collective agreement covering that unit. [*Id.* at 246 (footnote omitted).]

Again, this New Jersey rule is distinct from the private sector rule under which the collective agreement's provisions and public law requirements are entirely distinct. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974) (in the private sector, "[t]he arbitrator . . . has no general authority to invoke public laws that conflict with the bargain between the parties"); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 744 (1981) ("the arbitrator is required to effectuate the intent of the parties, rather than to enforce the statute").

The New Jersey Supreme Court has "consolidate[d]" its teachings with respect to the scope of "collective negotiations" into a "three-part test for scope of negotiations determinations." *Wright v. East Orange Bd. of Ed.*, 99 N.J. 112, 491 A.2d 644, 646 (1985):

> First, a subject is negotiable only if it intimately and directly affects the work and welfare of public employees. Second, an item is not negotiable if it

has been preempted by statute or regulation. Third, a topic that affects the work and welfare of public employees is negotiable only if it is a matter on which negotiated agreement would not *significantly* interfere with the exercise of inherent management prerogative pertaining to the determination of government policy. [Citations and internal quotation marks omitted.]

See IFPTE Local 195 v. State, 88 N.J. 393, 443 A.2d 187, 191-192 (1982) (developing and explaining this three-part test).

* * *

In sum, the New Jersey legislature has created a labor relations system in which a "significant quantum of public employee rights and benefits . . . are determined outside the collective-negotiation process." *Boonton Bd. of Ed. v. Kramer, supra*, 494 A.2d at 290. Under that system, "[f]or New Jersey public employees, collective bargaining is inextricably intertwined with legislative change." *Robinson v. New Jersey, supra*, 741 F.2d at 609.

B. The Relationship Between Statutes and Regulations Setting Terms or Conditions of Employment and Collective Negotiations.

As we have seen, "specific statutes or regulation which expressly set particular terms and conditions of employment" both preempt collective negotiations with respect to such terms and conditions *and* "are effectively incorporated by reference as terms of any collective agreement covering that unit." *State v. Supervisory Employees Ass'n, supra*, 393 A.2d at 246. With respect to such statutes and regulations, "disputes concerning their interpretation, application or claimed violation would be cognizable as grievances subject to the negotiated grievance procedure contained in the agreement." *Twp. of West Windsor v. PERC, supra*, 393 A.2d at 264. And, disputes over the application of statutes or regulations setting terms or conditions of employment may be submitted to arbitration, if the grievance procedures so provides. *Teaneck Bd. of Ed. v. Teaneck Ed. Ass'n*, 94 N.J. 9, 462 A.2d 137, 140 (1983). "To this extent, the scope of grievability is more expansive than the scope of negotiability." *Twp. of West Windsor v. PERC, supra*, 393 A.2d at 294.[3]

Given this rule and the fact that preemptive regulations may be issued by the very state agency with which a union otherwise negotiates, the New Jersey Supreme Court developed a rule of qualified preemption where regulations have been adopted by an employer:

> [I]f the agency acts in dual capacities and promulgates a regulation affecting employees under its

[3] As we have noted, statutes and regulations can also affect collective negotiations by setting a range within which bargaining can take place. "If the legislation, which encompasses agency regulations, contemplates discretionary limits or sets a minimum or maximum term or condition, then negotiation will be confined within these limits." *Bethlehem Twp. Bd. of Ed. v. Bethlehem Twp. Ed. Ass'n*, 91 N.J. 38, 449 A.2d 1254, 1257 (1982). "Thus, where a statute or regulation mandates a minimum level of rights or benefits for public employees but does not bar the public employer from choosing to afford them greater protection, proposals by the employees to obtain that greater protection in a negotiated agreement are mandatorily negotiable." *State v. State Supervisory Employees Ass'n, supra*, 393 A.2d at 246.

"For example, *N.J.A.C.* 9:2-3.6 [a regulation adopted by the State Board of Higher Education] allows the Board 'at least two weeks' in which to give notice of proposed layoffs. Setting a longer period of time for giving notice remains open to negotiation. And *N.J.A.C.* 9:2-3.7 requires the Board to give layoff notices to individual employees 'as soon as possible.' This indefinite time frame also remains open for negotiation. In regard to reemployment, *N.J.A.C.* 9:2-3.8 authorizes the rehiring of faculty members 'who the President believes, as a result of his academic judgment, are qualified to fill the position.' The procedures relating to rehiring, including notice and rudimentary due process, vitally affect employment interests and are negotiable." *New Jersey State College Locals v. State Board of Higher Ed., supra*, 449 A.2d at 1252 (discussing the effect of regulations adopted by the State Board of Higher Education on negotiations between teachers unions, on one hand, and state colleges and the Board, on the other).

> control, its regulations establishing terms and conditions of employment will not necessarily preempt negotiation on the subject matter covered therein. In this latter setting, preemption will be presumed. However, that presumption can be overcome by demonstrating that the regulations were arbitrary, adopted in bad faith, or passed primarily to avoid negotiation on terms and conditions of employment. [*New Jersey State College Locals v. State Bd. of Higher Ed.*, *supra*, 449 A.2d at 1249.]

On the other hand, "if the agency acts solely as a regulator and has no direct employer interest over the employees affected, its regulations fixing terms and conditions of employment must be given the same preemptive effect as a statute." *Id.* Even where an employer-agency has properly adopted preemptive employment regulations, the union is entitled under the New Jersey Constitution to discuss with the agency proposals to change the regulation, either to make the matter negotiable or to change the terms set by regulation. *Probation Officers v. Passaic County*, 73 N.J. 247, 374 A.2d 449, 454 (1977).[4]

C. Terms and Conditions of Employment on Which Negotiated Agreement Might Significantly Interfere With the Determination of Government Policy.

The New Jersey statute excludes from collective negotiations any public employment decision that "is preeminently a governmental policy responsibility that would be significantly encumbered or impaired if it were subject to mandatory negotiations." *New Jersey State College Locals v. State Bd. of Higher Ed.*, *supra*, 449 A.2d at 1251. "Where an express or inherent management prerogative is the dominant factor [in an employment

[4] Because an agency's regulatory authority ultimately derives from statutory law, a union may challenge the validity of a preempting employment regulation on the grounds that it exceeds the scope of the agency's authority or conflicts with a statute. *See, e.g., New Jersey State College Locals v. State Bd. of Higher Ed.*, *supra*, 449 A.2d at 1253-54.

decision], the subject is not negotiable," and "[n]ot even the impact of such a subject on employment conditions is negotiable. . . ." *Patterson Police Local 1 v. City of Patterson*, 87 N.J. 78, 432 A.2d 847, 854 & n.3 (1981).[5] *Compare First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681 (1981) (discussing "'effects' bargaining mandated by [NLRA] § 8(a)(5)"). This exclusion of matters affecting determination of government policy is part of the definition of mandatorily negotiable subjects, and is in addition to the statutory and regulatory preemption of collective negotiations just discussed. *State v. State Supervisory Employees Ass'n*, *supra*, 393 A.2d at 67 & 80.[6]

[5] For example, "neither the decision to reduce teaching staff nor the impact of such a reduction is negotiable." *New Jersey State Locals v. State Bd. of Higher Ed.*, *supra*, 449 A.2d at 1251, citing *In re Maywood Bd. of Ed.*, 168 N.J. Super. 45, 55-58, 401 A.2d 711 (App. Div.), *certif. denied*, 81 N.J. 292, 405 A.2d 836 (1979).

[6] Under New Jersey law, moreover, "[a] matter that is not legally negotiable in the first place cannot be arbitrable." *Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed.*, *supra*, 393 A.2d at 286. Thus, unlike statutes or regulations setting terms and conditions of employment, which may be subject to arbitration, employment decisions affecting the formulation of government policy may *not* be subjected to final and binding arbitration. *Id. See, e.g., Old Bridge Bd. of Ed. v. Old Bridge Ed. Ass'n*, 98 N.J. 523, 489 A.2d 159, 163-164 (1985). "Unlike the private sector, prerogatives of management [in the New Jersey public sector], particularly those involving governmental policy making, cannot be bargained away to be determined by an arbitrator." *Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n*, *supra*, 462 A.2d at 139 (1983).

The rigor of that basic rule, however, is tempered by the refinement that "[a]lthough the scope of arbitrability is limited by the test for negotiability, . . . the scope of matters about which public employees must be able to present grievances . . . is broad, exceeding the scope of issues that may be submitted to binding arbitration." *Teaneck Bd. of Ed. v. Teaneck Ed. Ass'n*, *supra*, 462 A.2d at 139. *See also Red Bank Ed. Ass'n v. Red Bank Bd. of Ed.*, *supra*, 393 A.2d at 274 ("The ability to have grievances so presented where a majority representative exists is an integral element of the employees' rights under Art. I, para. 19 [of the New Jersey Constitution]."). If the collective agreement so provides, it is permissible

New Jersey has excluded employment decisions implicating the formation of government policy on the ground that "[m]atters of public policy are properly decided, not by negotiation and arbitration, *but by the political process*[,] . . . *including public debate, lobbying, voting, legislation and administration.*" *IFPTE Local 195 v. State, supra*, 443 A.2d at 191 (emphasis added). The decision to exclude employment-related policy decisions from negotiations is *not* based on a determination that majority representatives have nothing of relevance to say on such matters. To the contrary, the New Jersey Supreme Court has gone so far as to "encourage[] the establishment of grievance procedures for [such] issues," as a means to "provide an expedited resolution of . . . claims and clear the air of much misunderstanding." *Teaneck Bd. of Ed. v. Teaneck Ed. Ass'n, supra*, 462 A.2d 142. In other words, the legislative intent was not to silence such representatives on employment-related issues, but to provide for legislative determination so that the decision would be the product of a wider discussion. *Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., supra*, 393 A.2d at 287; *Patterson Police Local 1 v. City of Patterson, supra*, 432 A.2d at 854.

To state that government policy issues are not negotiable is not to define with precision what is a government policy issue. And that process of definition has proved to be a large undertaking. "[W]hether an issue is appropriately decided by the political process or by collective negotiations," requires a "sensitive determination" of the relative weight of "the competing interests of the State and its employees. . . ." *IFPTE Local 195 v. State, supra*, 443 R.2d at 191. The New Jersey Supreme Court has made clear that this weighing process requires more than "the mere invocation of abstract categories like 'terms and conditions of employment' and 'managerial prerogatives'. . . ." *Id.* Rather, "[i]ts resolution depends upon several factors." *Woodstown-Pilesgrove Bd. of Ed. v. Woodstown-Pilesgrove Ed. Ass'n*, 81 N.J. 582, 410 A.2d 1131, 1134 (1980).

for the grievance procedure to culminate in *advisory* arbitration regarding policy-related employment decisions. *Bernards Bd. of Ed. v. Bernards Ed. Ass'n*, 79 N.J. 311, 399 A.2d 620, 628 (1979).

The first consideration is "whether the public employer is exercising an inherent or express managerial prerogative." *Id.* This turns on the employer's authority under statutes other than the Employer-Employee Relations Act. If an employment decision "is a matter of essential managerial prerogative which has been delegated by the Legislature to the [employer], it cannot be bargained away." *Id.* (internal quotation marks omitted). Thus, "[i]f the employer has acted pursuant to a managerial prerogative, the inquiry may end at this point." *Id.* However, if the employer's decision "falls within the general category of management authority," the concrete circumstances surrounding the decision must be considered in a "weighing or balancing" of the State's interest in "a viable bargaining process in the public sector" against its interest in opening policy decisions to public debate. *Id.* at 1134 & 1135.

Given the nature of the inquiry defined by the New Jersey Supreme Court, there is often a fine line between negotiable and nonnegotiable decisions. Most notably, that Court has recognized that while a policy decision itself is not negotiable, employment-related questions about the procedure for implementing the policy decision are negotiable. *New Jersey State College Locals v. State Bd. of Higher Ed., supra*, 449 A.2d at 1251. For example, "promotional criteria are not mandatorily negotiable while promotional procedures are so negotiable." *State v. State Supervisory Employees Ass'n, supra*, 393 A.2d at 251.

The primary focus is often on the duties assigned to the employer-agency by the legislature, and the effect of the employment-decision on carrying out those duties. Thus, the Court determined that a proposal for five days notice prior to classroom visitations for teachers evaluation would interfere with the School Board's duty to

evaluate teachers. *Bethlehem Twp. Bd. of Ed. v. Bethlehem Twp. Ed. Ass'n*, 91 N.J. 38, 449 A.2d 1254, 1260 (1982). At the same time, the New Jersey Court determined that a proposal to limit successive classroom visitations/observations would not significantly interfere with the School Board's duty, and thus was mandatorily negotiable. *Id.* at 1261.

In determining the possible effect of negotiations on policy formulation, the New Jersey courts consider the likely impact of the particular proposal being advanced by the union. For instance, while decisions to transfer employees are not generally negotiable, a proposal that would limit the transfer of a relatively small number of employees may be negotiable. *IFPTE Local 195 v. State*, *supra*, 443 A.2d at 200-201. Similarly, the size of the employer's workforce has been a determinative factor in whether or not a union proposal on work scheduling is mandatorily negotiable. *Twp. of Mt. Laurel v. Mt. Laurel Police Officers Ass'n*, 215 N.J. Super. 108, 521 A.2d 369, 372-373 (App. Div. 1987).

In short, many decisions New Jersey excludes from collective negotiation because of their effect on formulation of government policy nonetheless have important effects on the terms and conditions of public employees. Whether a decision is mandatorily negotiable is determined by a close examination of the public employer's statutory authority and duties, and a careful weighing of the competing state interests in peaceful labor relations and public debate over policy decisions, all within the context of the particular employment setting and the particular demands under consideration.

III. NEW JERSEY'S INTEREST IN PERMITTING UNIONS TO USE REPRESENTATION FEES TO FINANCE LOBBYING ON TERMS AND CONDITIONS OF EMPLOYMENT.

Having explored this complex body of labor-management relations law in some detail, we are now in a position to return to a consideration of why the New Jersey Legislature has authorized unions to use representation fees for the "support of lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours and other conditions of employment in addition to those secured through collective negotiations with the public employer," N.J.S.A. 34:13A-5.5c, and why the New Jersey Supreme Court has determined that this authorization "furthers the state's significant interest in public-employment stability. . . ." *Boonton Bd. of Ed. v. Kramer*, *supra*, 494 A.2d at 292.

A. Lobbying on "Policy Goals in Collective Negotiations and Contract Administration."

The State's interest in furthering the ability of a majority employee representative to state its position to the Legislature with respect to "policy goals in collective negotiations and contract administration" is part and parcel of its overall interest in the statutory collective bargaining system. The New Jersey Supreme Court has stated that the point of that system is to provide public employers and public employees "with an *effective* procedure for the *mutual* resolution of disputes," *Lullo v. Fire Fighters Local 1066*, *supra*, 262 A.2d at 685 (emphasis added). If that goal is to be realized, the Legislature must know whether the employees believe that the system is "effective" and whether the resolutions the system achieve are "mutual" and if not what changes will make the system work as it is intended to work.

Not surprisingly, there have been numerous union suggestions for change and on a number of occasions, the Legislature has responded to proposals to broaden the scope of collective negotiations by amending the Employer-Employee Relations Act. For example, in 1974 the legislature amended N.J.S.A. 34:13A-8.1 to provide that an administrative agency's *authority* to promulgate employment regulations does not preempt collective negotiations, only regulations actually adopted do so.

State v. State Supervisory Employees Ass'n, supra, 393 A.2d at 246. Similarly, the legislature amended the Act to create a limited category of permissive subjects of negotiation for police and firemen. *Twp. of Mt. Laurel v. Mt. Laurel Police Officers Ass'n, supra*, 462 A.2d at 371 & n.1. Since these changes affect the role of unions as majority representatives, and do not affect workplaces where there is no union representative, it seems self-evident that the Legislature would have been most interested in hearing the views of unions before adopting such amendments, and would have been severely handicapped in its deliberations if there were no provision for the expression of those views.

B. Lobbying on Statutes and Regulations That Set Terms and Conditions of Employment.

New Jersey statutes and regulations that establish "terms and conditions of employment" have a direct and immediate impact on the role of the majority representative in the statutory system of collective negotiation and grievance resolution. As already explained, such statutes and regulations preclude bargaining on matters that would otherwise be subject to collective negotiation, and are effectively incorporated into the collective agreement and are subject to the agreement's grievance procedure. *State v. State Supervisory Employees Ass'n, supra*, 393 A.2d at 246; *Twp. of West Windsor v. PERC, supra*, 393 A.2d at 264. Thus, not only is the majority representative precluded from negotiating with respect to the terms set by these statutes and regulations, the union is required to enforce these terms in representing employees through the grievance procedure. *See Lullo v. Fire Fighters Local 1066, supra*, 262 A.2d at 694.

Precisely because there is such a close relationship between statutes and regulations setting terms and conditions of employment and collective negotiations and grievance handling, the New Jersey Supreme Court has recognized that "a public employee union that ignored this

reality would not represent properly the members and nonmembers in its bargaining unit." *Boonton Bd. of Ed. v. Kramer*, 494 A.2d at 291. We do not see how any other conclusion is possible. That "collective bargaining is inextricably intertwined with legislative change," *Robinson v. New Jersey, supra*, 741 F.2d at 609, becomes apparent when the three instances in which union lobbying directly addressed to employment terms might occur are considered.

(i) Because statutes and regulations may preempt the terms of collective agreements, it is always possible that a change in a statute or regulation will invalidate what was once a valid term of a collective agreement and replace it with another term. The same interest in labor peace that justified the agreement in the first place is served by allowing the majority representative to defend the agreement. *See supra* pp. 10-11 (discussing the State interest as articulated by the New Jersey Supreme Court). The employees are not likely to feel that they have participated in "an effective procedure for the mutual resolution of disputes involving terms and conditions of employment," *Lullo v. Fire Fighters Local 1066, supra*, 262 A.2d at 685, if having once reached agreement through that procedure the employees as a group must stand by mute while the agreement is changed through the legislative or regulatory process.

This is especially so if the New Jersey Court's perception is correct and those employees are peculiarly disadvantaged when their terms of employment are considered in the political arena. *Twp. of West Windsor v. PERC, supra*, 393 A.2d at 262. Moreover, the better understanding achieved by the exchange of views during negotiations is lost if the union does not express its views to the legislature or agency that intends to substitute statutory or regulatory provisions for those contained in the collective agreement.[7] Finally, the public employer

[7] "The chief advantage which comes from the practice of periodically determining the conditions of labor by collective bargaining

will undoubtedly have the opportunity to express its views, and the State has an obvious interest in hearing the views of *both* the employer and the union before it acts to change certain terms of their agreement.

(ii) Where an existing statute or regulation preempts negotiations on a particular term of employment, the union may lobby to change the statute or regulation in order to open the matter to bargaining or to ratify a tentative agreement reached with the employer. Both activities are closely related to collective negotiations.

When a union lobbies to change a statute or regulation that preempts collective negotiations, its activity is a necessary prelude to negotiations. The State interest in fostering this sort of union activity is identical to its interest in establishing a system of collective negotiations. Indeed, since the very employer with which the union negotiates may have promulgated the preemptive regulation, this sort of union lobbying is a particularly close analogue to collective negotiations. *New Jersey State College Locals v. State Bd. of Higher Ed., supra,* 449 A.2d at 1249. While the exclusive representative does not have a statutory right to negotiate for changes of the preemptive regulation, the union does have a right under the New Jersey Constitution to present proposals to the employer for a change in the regulation. *Probations Officers' Ass'n v. Cty. of Passaic, supra,* 374 A.2d at 454. In lobbying of this sort, the union would be engaged in discussions with the same agency and on the same subject matter as would otherwise occur in collective negotiations. A change in the regulation does, of course, involve public debate that would not be part of collective negotiations, but the New Jersey Constitution

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directly between employers and employees is that thereby each side obtains a better understanding of the actual state of the industry, of the conditions which confront the other side, and of the motives which influence it." Wellington & Winter, *The Unions and the Cities* 8 (1970) quoting *Final Report of the Industrial Commission* (1902).

gives the employees an enhanced voice and confers an official status on their representative in that debate. *Twp. of West Windsor v. PERC, supra,* 393 A.2d at 262; *Red Bank Reg. Ed. Ass'n v. Red Bank Bd. of Ed., supra,* 393 A.2d at 135.

While employers and unions may not reach a binding agreement with respect to a term of employment set by statute or regulation, they may "discuss desirable changes in this vein and even go so far as jointly to present recommendations concerning such changes to the Legislature or to the Civil Service Commission." *State v. State Supervisory Employees Ass'n, supra,* 393 A.2d at 249-250. *See, e.g., Policemen Benevolent Ass'n v. PERC,* 187 N.J. Super. 202, 453 A.2d 1373 (App. Div. 1982), *certif. denied,* 93 N.J. 269, 460 A.2d 672 (1983).

This is a particularly common phenomenon with respect to the Department of Personnel (formerly the Civil Service Commission) regulations, since the Department is authorized to regulate many terms and conditions of state employment, *see, e.g.,* N.J.S.A. 11A:3-7 & 11A:6-24, and is required to consider employee proposals regarding such regulations, N.J.S.A. 11A:2-11m. While the "employer lacks the authority to bind the [Department of Personnel] by collective agreement," *State v. State Supervisory Employees Ass'n, supra,* 393 A.2d at 254, employers frequently agree to jointly approach the Department along with the union to request changes in regulations to allow tentatively agreed upon contract terms to take effect. Such lobbying is an immediate outgrowth of collective negotiations. Again the State interest in hearing such union proposals is identical to its interest in allowing collective negotiations.

(iii) Finally, the majority representative may support the adoption of legislation or a regulation that sets a term of employment in a way that is advantageous to represented employees, or that improves a term of employment already set by statute or regulation. If the union succeeds in this effort, the term is incorporated

into the collective agreement just as if it had been collectively negotiated directly with the employer. The union achieves precisely the same result through lobbying without first reaching agreement as it does in the first two examples by lobbying after reaching agreement. The difference is merely a tactical one, and if the first two sorts of lobbying further the State interest in "an effective procedure for the mutual resolution of disputes involving terms and conditions of employment," *Lullo v. Fire Fighters Local 1066*, *supra*, 262 A.2d at 685, the third sort must as well.

C. Lobbying on Government Policy Decisions that Directly Affect Terms and Conditions of Employment.

Under Art. I, para. 19 of the New Jersey Constitution, public employers must discuss personnel policy matters that are essentially managerial prerogatives with the majority representatives chosen by their employees. *Teaneck Bd. of Ed. v. Teaneck Ed. Ass'n*, *supra*, 462 A.2d at 142; *Probation Officers Ass'n v. City of Passaic*, *supra*, 374 A.2d at 454. While such matters are not subject to negotiation or binding arbitration, decisions with respect to personnel policy may be subject to the contractual grievance procedure and to advisory arbitration. *Bernards Bd. of Ed. v. Bernards Ed. Ass'n*, *supra*, 399 A.2d at 627. The State Supreme Court has repeatedly acknowledged the beneficial labor-relations effects of discussing employment-related policy decisions, even though such matters are not subject to collective negotiations. *Teaneck Bd. of Ed. v. Teaneck Ed. Ass'n*, *supra*, 462 A.2d at 142; *Bernards Bd. of Ed. v. Bernards Ed. Ass'n*, *supra*, 399 A.2d at 454.

As we have seen, New Jersey has taken care to insure that its employees are heard on matters affecting terms of employment, "because of the fact that the political interests of the governmental decision-makers and the economic interests of the voting public . . . are inherently

adverse to the employment interests of public employees. . . ." *Twp. of West Windsor v. PERC*, *supra*, 393 A.2d at 262. This conflict of interests exists just as much with respect to policy decisions made through the political process as with decisions consigned to collective negotiations. Moreover, the concern that, without a collective voice, employees' views would go unheard, due to their "trepidation" about putting themselves "on the line," applies just as much to decisions within the political process as it does to discussions within collective negotiations.

An example will show how these two basic considerations come into play in a typical non-negotiable policy determination. Under New Jersey law, employee transfers are considered an "essential managerial prerogative," and thus are not negotiable. *Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed.*, *supra*, 393 A.2d at 284. However, a transfer may affect employees in a variety of ways from such mundane matters as whether there will be adequate parking to more crucial matters such as the safety of the new location. These considerations may not occur to the legislators or administrators, who are frequently remote from the employment setting, but they are obviously relevant to whether the transfer is a good idea and are matters the decisionmaker would sensibly take into account. However, without some established channel for the expression of employee sentiment, the employees' point of view is not likely to reach the decisionmaker.

The close relationship between policy decisions affecting terms of employment and the terms established by collective negotiations justifies assigning a special role to the majority representative in the process of determining policy. In the first place, many of the terms of the collective agreement will be intertwined with the policy decision itself. This is so, because, while policy decisions are not negotiable, the procedure for implementing policy decisions is negotiable. *New Jersey State*

College Locals v. State Bd. of Higher Ed., supra, 449 A.2d at 1251.

If the employer is going to negotiate over the procedure for implementing a policy, it makes sense for the employer to hear the views of its employees on how the policy itself affects their employment, even though that is not open to negotiation. Moreover, decisions of personnel policy are likely to affect the positions taken by the majority representative on negotiable matters beyond implementation of the policy. This is so, because the employees, and consequently their representatives, do not tend to distinguish between their terms and conditions of employment that are negotiable and those that are not, they consider them by and large to be an integrated whole. Since the goal of the majority representative is to improve those terms as a whole, improvements or impairments in non-negotiable terms of employment are likely to be balanced by demands with respect to negotiable terms. Thus, the representative's views in this regard are also useful to the decisionmaker.

Employment matters that affect government policy were left non-negotiable by the New Jersey statute to insure that such matters would be decided in a forum where "citizen participation will not be precluded." *Patterson Police Local 1 v. City of Patterson, supra,* 432 A.2d at 854. *See Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., supra,* 393 A.2d at 287. It is not at all inconsistent with this goal for the legislature to encourage majority representatives to express the views of public employees by lobbying with respect to policy decisions that affect their terms of employment.

IV. NEW JERSEY'S LABOR RELATIONS INTERESTS JUSTIFY THE STATE'S DECISION TO ALLOW THE USE OF REPRESENTATION FEES FOR EMPLOYMENT-RELATED LOBBYING.

In *Abood v. Detroit Board of Education,* 431 U.S. 209, 219 (1977), this Court began by recognizing that it is

the legislature that "is charged with identifying '[t]he ingredients of industrial peace and stabilized labor-management relations,' " and that a legislative determination that "it would promote peaceful labor relations to permit a union and an employer to conclude an agreement requiring employees who obtain the benefit of union representation to share its costs, [is] . . . surely an allowable one." While "compel[ling] employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests," the holding of *Abood* is that "such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by [the legislature]." *Id.* at 222.

The New Jersey Legislature has designed a public sector labor relations systems in which some decisions affecting terms of emyployment are assigned to collective negotiations, and some are assigned to the legislative and regulatory processes. The Legislature has determined, moreover, that it is beneficial for those deciding non-negotiable employment-related questions to hear the views of the employees' majority representatives, and to this end the legislature has allowed unions to use representation fees for employment-related lobbying.

As the foregoing discussion demonstrates in some detail, the New Jersey Supreme Court was correct in its conclusion that "the state's significant interest in public-employment stability" justifies the authorization for lobbying charges in the New Jersey Employer-Employee Relations Act. *Boonton Bd. of Ed. v. Kramer, supra,* 494 A.2d at 292. As we have seen, "many of the most important benefits of public employment are determined by statute" and regulation. *Id.* at 291. "[A] public employee union that ignored this reality would not represent properly the members and nonmembers in its bargaining unit." *Id.* In adopting the Employer-Employee Relations Act, the New Jersey legislature did not "seek the creation of ineffectual public employee unions, ..."

Robinson v. New Jersey, supra, 741 F.2d at 609. To the contrary, the legislature was motivated by the perceived need for "an effective procedure for the mutual resolution of disputes involving terms and conditions of employment." *Lullo v. Fire Fighters Local 1066, supra*, 262 A.2d at 685. The authorization to use representation fees for employment-related lobbying is plainly "reasonably related to the advancement of such goals," and thus is an allowable legislative choice under the First Amendment. *Keller v. State Bar of California, supra*, 110 S.Ct. 2228, 2237 (1990).

CONCLUSION

For the above-stated reasons as well as those stated by the respondent, the judgment below should be affirmed.

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JAMES P. LEHNERT, *et al.*,
Petitioners,

v.

THE FERRIS FACULTY ASSOCIATION-MEA-NEA, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 90 national and international unions with a total membership of approximately 14 million working men and women, with the consent of the parties as provided for in this Court's Rules.

INTRODUCTION AND SUMMARY OF ARGUMENT

Without exception, so far as we are aware, labor relations statutes in this country permit employees in an appropriate collective bargaining unit to choose—by a majority vote in a democratic election—a labor organization as their exclusive representative for that unit that provides collective-bargaining-related services to more than one bargaining unit, and that sets its dues in a way that requires the employees in all the represented units to pay a pro rata share annually of all of the union's chargeable expenses *or* a labor organization confined to the employees' own unit.

Petitioners maintain, *inter alia*, that objecting fee-payers have a constitutional right to opt out of a multi-bargaining unit economic system for providing collective-bargaining-related services chosen by the unit as a whole, and to insist, instead, upon paying an agency fee that only covers such collective-bargaining related services as are directly rendered to the particular bargaining unit in which the fee payers work within a particular year.[1]

[1] In this case, the Ferris Faculty Association-MEA-NEA is a local labor organization affiliated with a state and a national organization, each of which provides collective-bargaining-related services to a large number of bargaining units.

In other instances, a local labor organization may itself represent two, or many, bargaining units. Or a national labor organization may itself be the bargaining representative, and may either operate as a unitary national organization or be split into local

Petitioners are wrong; the Constitution no more enacts their "direct costing by bargaining unit" theory (Brief for Petitioners, 21) than Mr. Herbert Spencer's Social Statics. We proceed to demonstrate as much by first considering the economics of this matter and by then turning to the First Amendment precedents.[2]

I. As the result of thousands of representation-election determinations by millions of employees, multiunit labor organizations that set their dues and fees on a cost-sharing basis have come to be the predominant type of American trade union.[3] Such organizations provide employees in each unit with access to greater resources, at lower cost, and with more assurance of availability when needed. A wide variety of labor organizations in both the public and private sectors have chosen some variant of the multiunit

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organizations for certain administrative purposes. *See* pp. 16-19, *infra*.

We do not believe, however, that the difference between a unit that has chosen as its representative a local union affiliated with a national union and a unit that has chosen a representative organized on another of these multiunit lines is significant for present purposes. In all these instances, the majority of employees has chosen an organization that is capable of generating larger resources, of producing economies of scale and of risk-sharing across bargaining units, and presumably has made the choice in part because of those capabilities.

[2] As to the remaining issues raised by appellants, the AFL-CIO concurs in the submissions of the respondent unions and the other *amici curiae* supporting respondents so as not to burden the Court with redundant argument.

[3] This case arises in the public employment context. However, the general models of union organization, and the economic principles and valuing considerations underlying those models are in large part the same whether the covered employees work in the public or private sector. Nor, to the extent that constitutional considerations apply at all to private sector employees (*see Communications Workers v. Beck*, 487 U.S. 735, 761-762 (1988); *compare Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956)), do those considerations vary fundamentally depending upon the public or private context. *Abood v. Detroit Board of Education*, 431 U.S. 209, 232 (1977). Consequently, in this brief, we draw upon examples from both the public and private sectors.

cost-sharing model, adapting the model to the particular circumstances of the industry in which the union operates. Thus, the multiunit method of providing and financing collective-bargaining-related services is one "normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit." *Ellis v. Railway Clerks*, 466 U.S. 435, 448 (1984).

Where a group of employees chooses a multiunit approach to providing and funding collective-bargaining-related services, objecting fee payers as well as union members share in the distinct added economic benefits of that approach: The efficiencies of integrating the pro-benefits provided by insurance principles.

These economic benefits are *not* taken into account in petitioners' "direct costing" approach. In contrast, Michigan in establishing its public employee labor relations system *has* taken these economic benefits into account. Michigan has done so by permitting employees to elect representation by unions organized and financed in whole or in part on a multi-unit/cost-sharing basis, and to require fee payers as well as union members to be charged for collective-bargaining-related services not on a fee-for-direct-services-rendered-to the unit basis, but on a uniform, flat fee basis. Michigan's judgment in this regard is that such a system advances the interest in industrial peace and does so in a way that prevents free riding. Pp. 4 to 19, *infra*.

II. This Court's precedents made it plain that the Constitution permits "the legislative enactment of 'agency shop' laws . . . to prevent 'free riders'—those who receive the benefit of union negotiation with their employers, but who do not choose to join the union and pay dues—from avoiding their fair share of the cost of a process from which they benefit." *Keller v. State Bar of California*, —— U.S. ——, 110 S.Ct. 2228, 2235 (1990). Having held the "agency shop" constitutional as a general matter, this Court's decisions further teach that the question to

be answered in passing on the constitutionality of one form of agency shop or another is "whether the[] expenses [at issue] involve additional interference with First Amendment interests of objecting employees, and, if so, whether they are nonetheless adequately supported by a governmental interest." *Ellis v. Railway Clerks*, *supra*, 466 U.S. at 456. And in making this assessment, the Court has expressly recognized that "[t]he very nature of the free rider problem and the governmental interest in overcoming it require that the union have a certain flexibility in its use of compelled funds." *Id.* at 456. All this being so, Michigan's conclusion that the agency fee should be based on a multiunit union's total collective-bargaining-related expenditures is plainly constitutional. Pp. 20 to 30, *infra*.

ARGUMENT

I. MULTIUNIT FINANCING OF COLLECTIVE-BARGAINING-RELATED SERVICES IS A METHOD COMMONLY USED BY LABOR ORGANIZATIONS, AND ONE WITH A DISTINCT ADDED ECONOMIC VALUE NOT FAIRLY REFLECTED IN THE DOLLAR COST OF THE DIRECT SERVICES PROVIDED TO A PARTICULAR BARGAINING UNIT IN A PARTICULAR TIME PERIOD.

We begin our examination of petitioners' contention that the *Constitution* requires that all union expenses for collective-bargaining-related activities be calculated on a bargaining-unit-by-bargaining-unit basis for agency fee purposes by considering some basic economic principles that have application not only in the agency fee context but in many other analagous areas.

Petitioners recognize, as they must, that objecting fee payers in a particular collective bargaining unit can constitutionally be required to pay for such collective-bargaining-related services as are directly provided to that unit by the union chosen to be the exclusive bargaining representative by a majority vote of the unit em-

ployees. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

The bargaining representative in this instance is a local union affiliated with large multiunit state and national unions, the Michigan Education Association ("MEA") and the National Education Association ("NEA"). By the terms of the affiliation, MEA and NEA provide certain collective-bargaining-related services to represented employees through the local union.

In common with most state and national unions, MEA's and NEA's basic income is derived from per capita fees paid by the employees represented by all their affiliated local unions. MEA and NEA aggregate those fees for the purpose of making collective-bargaining-related services available to all their local affiliates. Indeed, the ability to amalgamate resources in this way for this purpose has been one of the primary forces propelling the growth of national, as opposed to local, labor organizations from the mid-nineteenth century on.[4]

Petitioners contend that it is unconstitutional to rely on this traditional method of sharing the costs of collective-bargaining-related activities among all employees represented by a multiunit union in calculating the agency fee charged to objecting employees. According to petitioners the Constitution requires "direct costing by bargaining unit." Brief for Petitioners (Pet. Br.) 21. Under the "direct costing" method, an objector's fee would "only include costs which an exclusive representative, and its affiliates, incur in performing its statutory duties as bargaining agent for the dissenters' unit in dealing with their employer on labor-management issues." Pet. Br. 19. And petitioners would have it that the traditional method of financing collective-bargaining-related activities

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[4] *See, e.g.*, R. Dulles & M. Dubofsky, *Labor in America: A History* 84-85, 94-95, 143-145 (4th ed. 1984); L. Ulman, *The Rise of the National Trade Unions* 176-89 (1963); Windmuller, *Concentration Trends in Union Structure*, 35 Ind. & Lab. Rel. Rev. 43, 44-45 (1981).

"charg[es] the nonmembers for those activities on behalf of persons not employed in their bargaining units. . . ." *Id.* at 18-19. Indeed, petitioners base their constitutional objection to the traditional method entirely on this perception: "Coerced subsidization of even non-unit bargaining adds substantially to th[e] interference [with First Amendment rights], because the labor relations of *other persons* 'are matters of public concern,' speech and association concerning which are fully protected by the first amendment." *Id.* at 20 (emphasis in original).

Petitioners fundamentally misstate the situation by asserting that the method of providing and funding collective-bargaining-related services at issue here charges one group of employees for "the labor relations of *other persons*." The proposition that groups of employees would regularly choose a form of union representation that systematically charges them for someone else's collective bargaining is intuitively unlikely. Not surprisingly, that is not at all what occurs.

In the balance of this section we show that by choosing to "operate on a cost-sharing basis" (Pet. App. 56a), employees obtain for themselves two kinds of economic benefits that the petitioners' "direct costing" theory wholly fails to take into account. The first are the efficiencies achieved by assembling and maintaining an expert staff ready and able to serve any represented bargaining unit as need requires. A fee that "only include[s] costs . . . incur[red] . . . in dealing with [the objector's] employer" (Pet. Br. 19), does not take into account the benefits and costs of maintaining the union's collective bargaining apparatus. Second, the availability of the union's total multiunit resources for use in representing a particular bargaining unit has a present economic value—similar to that of insurance coverage—even when the unit is not presently drawing on those resources. Again, the petitioners' "direct costing" theory factors out any "premium" for this coverage.

In short, we show that by operating on the traditional "cost-sharing basis" (Pet. App. 56a), MEA and NEA are not compelling petitioners to pay for "the labor relations of *other persons*" (Pet. Br. 20 (emphasis in original)), but rather are providing each represented bargaining unit, including the petitioners' unit, with two distinct, economically valuable benefits that are fairly taken account of by charging each fee payer a pro rata share of the unions' total collective-bargaining-related costs and that are simply ignored by petitioners' "direct costing" theory.[5]

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[5] Since petitioners' fundamental submission is that objecting fee payers can insist upon contributing only to those collective-bargaining-related expenses actually incurred in the "bargaining unit" in which the fee payer works in a given year, the concept of the "unit" for collective bargaining purposes bears some examination.

As a general matter, the "unit" is simply the group of employees for whom negotiations are conducted, and who are covered by the resulting collective bargaining agreement. The size and scope of the "unit" is, under most labor relations statutes, determined according to a combination of flexible factors; consequently, there can be a number of different possible "appropriate" units for a given group of employees. *See Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950).

Thus, under the National Labor Relations Act, a "unit" for collective bargaining purposes can be a subgroup of employees in a particular plant of a particular employer, all the employees of that plant, a craft or departmental group on a multiplant, single employer basis, a craft group on a multiemployer, regional basis, or a regional or nationwide single employer group, including all employees of that employer or a subgroup organized either by department or by craft. *See generally* R. Gorman, *Labor Law*, 66-92 (1976). The precise choice is governed in part by the National Labor Relations Board's standards for different industries, and in part by the choice of the employees and, to some extent, the employers involved. Gorman, *supra*, 68-74.

The same variety obtains in the public sector. For example, while the particular unit in this case covers only a single campus of Michigan's public higher education system, in other instances all the campuses of a higher education institution statewide have been determined to comprise a single unit. *See Minnesota State*

A. *Economies Achieved Through Aggregation of Resources*: By aggregating fees from many bargaining units, MEA and NEA, like other state and national unions, are able to assemble and maintain a specialized and experienced staff that the typical local union could not afford to assemble on its own.

For example, while the average bargaining unit of community college employees would not have the wherewithal to support an in-house economic analysis staff—familiar with the economics of public education generally and public higher education particularly, as well as with the applicable laws and current collective bargaining situation—MEA and NEA can and do maintain such staffs. As a result, the employees in any MEA-NEA bargaining unit have available to them, *at no extra cost*, the services of that staff should a need for economic analysis occur. In addition, unit employees benefit from research conducted by such analysts on a state or nationwide basis, research that no individual unit could afford to finance.

State and national unions, in other words, are the primary means for providing the "lawyers, expert negotiators, economists, and research staff, as well as general administrative personnel" necessary to effectively represent employees working for sophisticated employers functioning in a complex national or international economy. *Abood v. Detroit Board of Education*, *supra*, 431 U.S. at 221. For it has proved beyond the financial capacity of the employees in most bargaining units and in most local unions to develop and maintain such expert staffs.

Board for Community Colleges v. Knight, 465 U.S. 271, 276 n.2 (1984) (all community colleges in Minnesota, by statute, comprise a single bargaining unit).

What this variety means, for present purposes, is that the number, identity and diversity of interests of employees who are in a given unit, and who, even under petitioners' theory, would be obliged to share equally in the costs of providing collective-bargaining-related services is, from a constitutional point of view and the point of view of an individual objecting fee payer, in large part a fortuity.

See D. Bok & J. Dunlop, *Labor & the American Community*, 153-54 (1970).

Moreover, even if an individual bargaining unit had the resources to do so, the unit ordinarily has no *need* for a *permanent* professional collective bargaining staff, for example, since collective bargaining agreements typically last for several years. *See, e.g., General Cable Corp.* 139 NLRB 1123, 1127 (1962) (under the NLRA, three-year collective bargaining agreements are the norm.) Similarly, while a unit may upon occasion become involved in a major lawsuit regarding the interpretation of its collective bargaining agreement, such litigation is relatively rare, and would not justify the hiring of a full-time staff attorney.

If such expert personnel could not be continuously employed on a statewide or nationwide basis—shifting their attention from bargaining unit to bargaining unit as issues requiring their attention arise—then the only—and highly disadvantageous—option would be to retain consultants on an as-needed basis. That option entails substantial costs.

First, it is improbable that consultants with the necessary training and experience would be available on a contract basis when needed. Second, the transaction costs involved in locating and retaining the best available consultants would be considerable. Third, engaging consultants in this manner is likely to be more expensive than employing staff experts because continuous employment offers a measure of financial security in exchange for lower hourly recompense. Finally, and perhaps most importantly, the intermittent use of outside consultants almost certainly will not be as effective, for the consultants will not have the opportunity to develop expertise on the particular problems that face the particular employees.

The special advantages of efficiency and effectiveness derived from aggregating union resources and making staff experts available at no additional cost on an as-

needed basis are recognized in an extensive economic literature on the reasons business organizations—faced with similar practical problems of operating in a complex environment—choose the similar solution of vertical integration into the firm.

In essence the economic learning is that it is more efficient to employ staff members than to contract for their services where the services required are "highly specific to the transaction, there is a high degree of uncertainty involved and, to justify the costs of setting up a system of internal organization, the transaction recurs frequently." S. Davis, "Vertical Integration," in R. Clarke & T. McGuinness, eds., *The Economics of the Firm*, 87 (1987) (Clarke & McGuinness). *See* O. Williamson, *Markets and Hierarchies*, 20-31 (1975).

There are, most importantly, significant savings in transaction costs if the organization is not repeatedly required to locate experts and negotiate for their services. *See* Sawyer, *The Economics of Industries and Firms*, 201 (1985) ("These [transaction] costs would include the time and financial costs of discovering a supply, finding out the price and the nature of the goods or services which the seller has to offer, and the difficulties of ensuring that the goods or services are of the type and quality required.").

As the economic literature also points out, another factor making vertical integration more efficient than employing outside consultants as needed is that staff experts, by working repeatedly on a recurrent set of problems arising in a particular industry or employment context (in this case, public education), gain knowledge that substantially lowers the cost, and increases the quality, of their work over time.[6] If the expert is work-

[6] That is why, for example, clients seek lawyers who specialize in a very specific area of practice, such as wills and estates or admiralty.

ing for an organization, that knowledge becomes an *organizational* asset for as long as the expert is employed. If, however, the expert provides services only as an independent contractor, the knowledge remains the *expert's asset*, that can be used to his or her advantage in renegotiating the consulting contract. *See* McGuinness, "Markets and Managerial Hierarchies," in Clarke & McGuinness, *supra*, 46-47.

Thus, in labor organizations as in businesses, so long as a "transaction recurs frequently" and is "highly specific" to a particular situation (Davis, "Vertical Integration," in Clarke & McGuinness, *supra*, at 87), providing services from within the organization is likely to be more efficient and effective than seeking out independent contractors on an intermittent basis. And, as we have emphasized, the required condition of frequency is not likely to prevail on a local bargaining unit basis, but will prevail only if costs can be aggregated over a sufficient number of local units.

B. *Assurance of Adequate Resources to Meet Extraordinary Demands*: A distinct but closely-related advantage of providing certain collective-bargaining-related services on a statewide, nationwide, or other multiunit basis is that the union is able to provide employees in each unit with an assurance that an extraordinary cost incurred in that unit in any given year will be covered. The applicable principle is the one upon which any insurance system operates: Such a system assumes that while each unit faces a *risk* of catastrophic costs in a given time period, only a small percentage of the units will actually incur such a cost. Each unit is nonetheless willing to pay a pro rata share of the probable catastrophic cost to the group as a whole (a "premium"), so that if the event insured against occurs in the unit, the unit's financial exposure will be limited to the amount of the premium.[7]

[7] Somewhat similarly, businesses often pool the risk of business failure through conglomerate mergers. By linking together the

Risk-sharing is as economically rational in the collective bargaining context as elsewhere: In buying insurance, an economic unit is purchasing the assurance that the unit will be able to meet unusually high costs, should such costs eventuate. That assurance obviates the need to place a substantial share of present income in a holding account in order to protect against the risk; allows rational economic planning; and induces third persons with whom the insured deals to proceed on the understanding that the costs will be covered if incurred.[8]

The essence of the matter is this: Carrying insurance has *present* economic value even if the risk insured against never occurs. That is why individuals who buy term life insurance have not thrown away their money if, as usually occurs, they do not die during the period of coverage.

By a parity of reasoning, by choosing to be represented by a national union that funds its collective-bargaining-related activities on an aggregate national

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economic fortunes of companies in diverse lines of endeavor, a corporation is able to reduce the risk that catastrophic losses of one company in a given year will force that company into bankruptcy:

> If we assume that in any given year (or run of years) there exists for each individual firm some positive probability of suffering losses large enough to induce financial failure, it can be readily shown that the joint probability of such an event is reduced by a conglomerate merger. Clearly, the possibility that the critical level of losses will occur simultaneously for each of the component companies making up the merger is less (and often very much less) than the individual probabilities. [Levy & Sarnat, *Diversification, Portfolio Analysis and the Uneasy Case for Conglomerate Mergers*, 25 The Journal of Finance 795, 801 (1970).]

See also, e.g., Lewellen, *A Pure Financial Rationale for the Conglomerate Merger*, 26 The Journal of Finance 521 (1971); Higgins & Schall, *Corporate Bankruptcy and Conglomerate Merger*, 30 The Journal of Finance 93 (1975).

[8] For example, many states *require* that each driver carry liability insurance, in order to protect those whom a driver may injure against the driver's financial insolvency.

basis, a bargaining unit assures itself, at a reasonable periodic cost, against the possibility that in a given year (for example, a year in which the unit is negotiating a new collective bargaining agreement), its costs will be so large that the unit could not, as a practical matter, raise the necessary funds by itself.

That assurance has value not only in years in which very large costs are incurred, but at *all times*, and even if the costs are never incurred: For one thing, the unit employees need not cut back on such services as grievance and arbitration assistance to individual employees in order to save for years in which unit-wide costs are likely to be extremely high, such as those in which agreements are negotiated. For a second, the assurance that the unit can call on such resources has the added economic value that any third party dealing with the unit—most importantly, in this instance, the employer—will be on notice that the resources are available, and will take account of that fact in his own economic behavior.[9]

C. *Analogous Economic Models*: As the foregoing suggests, and contrary to petitioners' proclamation that "[i]n the free market no one who provides services would be in business long if he charged all customers the same average fee for different services" (Pet. Br. 24), the general method of providing and funding services used by multiunit state and national unions is in no way unique in our economy. Rather, many other organizations provide and price specialized services on an average

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[9] Strike funds, prevalent in private sector national unions, are an excellent example, although far from the only one, of this risk-sharing phenomena: Strike benefits obviously cannot be drawn from the employees in the bargaining unit that is currently on strike. Strikes *must*, therefore, be financed either by the accumulation of funds by a single unit for use in the future or, much more prevalently, by the accumulation of funds on a multiunit basis. Ulman, *The Rise of the National Union*, *supra*, 176. In either case, given the turnover of employees within an individual unit, the employees funding the strike are, in the short run, different from the employees directly benefitting from those funds.

cost, or risk-sharing, basis in preference to a fee-for-direct-services-rendered basis.

Service contracts for computers and copiers, prepaid legal services plans, homeowners' warranty programs covering electrical, plumbing, heating, and similar systems, and extended warranties on automobiles are only a few of the situations in which consumers pay a flat fee for the right to call upon expert services in the future should the need arise, and in which the economic value of that promise cannot be measured by *retrospectively* tracing the actual use made of that available service by a certain consumer in a certain year.

Health maintenance organizations ("HMOs"), because of their internal complexity and the extent to which the organization provides both an "insurance" benefit and an "aggregation of resources-efficiency benefit," provide a particularly close analogy. These organizations "provide[] a wide range of health care services to a defined, enrolled population for a predetermined, prepaid premium . . . . unrelated to the actual number of services utilized by an enrollee in a particular time period." S. Rep. No. 93-129 on the Health Maintenance Act of 1973, 93 Cong., 1st Sess., 2 (1973).

By so doing, the HMO provides this range of health services at a per-unit cost "as much as one-fourth to one-third lower than traditional care in some parts of this country." *Id.*[10] In addition, the HMO approach allows for a more rational integration of the services provided; permits extensive services to be provided in areas that

[10] The reasons why individual medical personnel may charge more than the cost to the HMO of providing the same health service have nothing to do with overreaching. Doctors and other medical personnel operating in small units, like consultants hired intermittently by single-unit unions, are likely to incur larger per capita overhead costs, including rent, support personnel, equipment, and so on. In addition, personnel employed by an HMO, like personnel employed by a national union, have a security of employment not available to those providing service on a fee basis; their salary will tend to reflect this increased security.

cannot support a broad range of medical care as traditionally structured; and provides the assurance that even catastrophic costs will be covered if incurred. *Id.*

While it continues to be true that many individuals nonetheless prefer to obtain medical services on a fee-for-service basis, millions of people have made the perfectly rational economic decision to procure their health services through advance, *pro rata* funding of a delivery system by many individuals.[11] Indeed, national health policy explicitly supports and encourages the availability of this means of procuring and funding health services, Health Maintenance Act of 1973, 42 U.S.C. § 300e *et seq.*

Thus, the wide variety of situations in which consumers are offered, and choose, prepaid access to expert services rather than fee-for-service access to those services, support the conclusion that charging objecting fee payers as well as union members for a pro rata share of a multi-unit union's collective-bargaining-related activities is a method for financing such activities "normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit." *Ellis v. Railway Clerks*, 466 U.S. 435, 448 (1984). As *Ellis* teaches, while Congress and the

[11] Even the individuals who do not join HMOs, of course, purchase health insurance when possible to cover the cost of those services. Thus, the choice between an HMO and traditional fee-for-service health care is really a choice between *delivery systems*, and *not* one between per unit-costing and cost sharing over many units. The situation is further complicated by the fact that in many places of employment, participation in a group health plan is mandatory rather than permissive. (The reason for this mandatory requirement is that if lower risk individuals cannot opt out, group insurance can be provided at a lower per capita cost than individual insurance.)

In other words, the health care system in this country is funded for the most part through the very cost-sharing principles that appellants claim are unconstitutional in this instance. We have chosen the HMO example in the text only because it is an even closer analogy to national unions than an ordinary health insurance scheme in that, through group action, HMO's provide economic advantages *in addition to* insurance against risk.

state legislatures are under no constitutional compulsion to accept the "normal" method of financing union representation, where the legislature chooses to do so to further the governmental interest in industrial peace, the Consititution is not an impediment to that decision. *Id.* at 455-456.

D. *"Normal" Union Practices*: We briefly consider the ways in which three specific unions provide and fund collective bargaining services to represented units. The three examples we discuss confirm that, while the range of possible relationships between bargaining units and levels of union organization is as wide as the range of job markets and employment settings in which people work, each variation "reasonably" reflects the structure of the particular industry in which the union operates, and each "normally" provides for a mixture of single unit and multiunit provision and funding of collective-bargaining-related services. This range of possibilities is reflected in the factual settings of this Court's most recent objecting fee payer decisions.

(i) The most recent of these decisions, *Communications Workers v. Beck*, 487 U.S. 735 (1938), arose out of bargaining units at the American Telephone and Telegraph Company ("AT&T") and the former AT&T subsidiary Chesapeake and Potomac Telephone Company of Maryland ("C & P Telephone"). The exclusive representative in *Beck* was the Communications Workers of America ("CWA"), a national labor organization.

CWA itself represents over 700 bargaining units of widely varying sizes in the communications industry alone; signs the applicable collective bargaining agreements; and has overall responsibility for administering those agreements through its central and regional staffs, including complete responsibility for handling grievances at the highest steps of the contractual procedures.[12]

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[12] With respect to the employers involved in *Beck*, there are several national AT&T bargaining units, each covering a different aspect of AT&T's operations, such as sales, manufacturing, installation, and research. The various national collective bargaining agreements between CWA and AT&T have common terms, and all are negotiated at once in a two-tiered discussion: The highest officers of CWA and the highest labor relations officials of AT&T engage in national bargaining to set the general economic terms of the agreements while, simultaneously, other representatives for the union and the employer hammer out the actual terms of the unit by unit collective bargaining agreements.

C&P Telephone is comprised of four different companies—one for each of the States of Maryland, Virginia and West Virginia and the District of Columbia. The agreement covering these four employers is negotiated in joint discussions between the CWA and the four C&P Telephone companies.

In addition, there are over a thousand local unions affiliated with the CWA. Those locals typically aid CWA in fulfilling its collective-bargaining-related activities by participating in the formulation of bargaining demands and in enforcing agreements at the lower levels of the grievance procedure. Many CWA locals represent employees in more than one bargaining unit.

The structure of the CWA and of the bargaining units CWA represents reflect the organization of the telephone industry: The telephone companies providing local service are generally organized along state lines, and given the highly integrated nature of their operations, employees have been generally required to organize on a company-wide basis to secure NLRB certification. *See, e.g., New England Telephone & Telegraph Co.*, 90 NLRB 639 (1950). And, of course, AT&T until quite recently held a virtual national monopoly in the industry.

(ii) The situation of the Chicago Teachers Union ("CTU"), the defendant in *Teachers Union v. Hudson*, 475 U.S. 292 (1986), is at the opposite extreme from that of the CWA: The CTU represents a single bargaining unit in the Chicago city school system. Within that unit are various groupings of professional, para-professional and non-professional employees, each of which could have formed a separate bargaining unit under Ill. Rev. Stat. Ch. 48, ¶ 1707, § 7.

The CTU, however, meets certain of its collective bargaining-related responsibilities by drawing on its affiliates, the Illinois Federation of Teachers ("IFT") and the American Federation of Teachers ("AFT"). The IFT has some 140 local affiliates, and the AFT has over 2,000 local affiliates, some of which represent more than one bargaining unit.

As with the CWA, the CTU's structure reflects the nature of the employer with which the union bargains: The Chicago school system is a large employer centered in one location. Against that background, it makes sense for a local organization to have relatively more direct bargaining responsibility than the state or national organizations. However, just as is the case with the respondent Ferris Faculty Association, the employees who chose the CTU found it desirable to be represented by a local union that could draw on the resources of affiliated state-wide and nation-wide unions.

(iii) Our final example is the Transportation-Communications International Union ("TCIU"), formerly the Brotherhood of Railway and Airline Clerks ("BRAC"), the defendant in *Ellis v. Railway Clerks*, 466 U.S. 435 (1984). The Railway Labor Act, which governs the industries in which TCIU most commonly operates, mandates single employer-wide craft or class bargaining units. 45 U.S.C. § 152, Ninth. Thus, the bargaining unit out of which *Ellis* arose encompassed the entire passenger service craft at Western Airlines.

The TCIU (then BRAC) was the recognized representative of this system-wide unit, and chartered System Board No. 451 as an intermediate body whose primary responsibility was serving the Western Airlines unit. That International also chartered a number of locals to represent Western Airlines employees at various work sites. Operating generally in this manner, the TCIU, either alone or jointly with its various system boards, is the representative of some 750 large and small craft-oriented bargaining units.

Again, it is the nature of the industry that determined the economic and structural relationship between the bargaining unit configuration and the structure of the union representing each unit: The nature of the railroad and airline industries, as reflected in the RLA itself, requires centralized collective bargaining. The employees at Western Airlines initially decided that this role could be best filled by a labor organization that represented employees in many such system-wide units, and chose the TCIU to perform that function (and later determined that a single unit Western Airlines union would be preferable).

Despite their wide variety and complexity, all three of these national unions have been organized on a multilevel basis, and all three provide collective-bargaining-related services in part through a multiunit system financed by pro rata payments from union members and fee payers.[13] Thus, these examples confirm that providing some or all collective-bargaining-related services through a multiunit union able to provide each unit with access to greater and more diverse resources, at a lower cost and with assurance of availability at times of crisis, is a method for providing those services "normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit." *Ellis v. Railway Clerks, supra*, 466 U.S. at 448.[14]

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[13] At the same time, these examples indicate that funding such services on a single unit basis no less than a multiunit basis can be said to result in an objecting fee payer being required to finance services for individuals whose economic interests may diverge from his own: The CWA units encompass diverse geographical areas, and sometimes more than one employer; the CTU unit is geographically limited, but occupationally diverse, including both professionals and non-professionals; and the TCIU units are occupationally limited but geographically dispersed.

[14] So that we are not misunderstood, we note that, since petitioners do not take issue with the proposition that collective-bargaining-related activities are chargeable to objecting fee payers, *in theory* the "direct costing" advocated by the petitioners should only affect

II. REQUIRING OBJECTING FEE PAYERS TO PAY THEIR PRO RATA SHARE OF A UNION'S MULTIUNIT SYSTEM FOR FUNDING COLLECTIVE-BARGAINING-RELATED EXPENDITURES IS CONSTITUTIONAL

We now return to petitioners' legal contention in this case: that objecting fee payers have a constitutional right to opt out of fair and equal participation in the multiunit/cost-sharing system for providing collective bargaining-related services chosen by the majority of the unit in which the fee payers work, and to fund those services instead as if the services were provided on a single unit, fee-for-direct-services-rendered basis. We show that permitting objecting fee payers to choose for themselves a fundamentally different method of funding collective-bargaining-related services than that selected by the majority of employees in the unit would produce precisely the economic free-riding the agency fee system is designed to prevent and would do so without serving any First Amendment values whatever.

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the way collective bargaining costs are divided among objecting fee payers, both over time and from unit to unit. *See* Pet. Br. 23 n.17 (suggesting that statutes could be amended to allow agency fees to exceed dues).

Assuming that the following conditions are satisfied, "direct costing" in other words, should only shift the share of the chargeable amount from some groups of objectors to other groups of objectors: *If* the objectors' share of collective-bargaining-related costs could be calculated in such a way as to assign to objectors as a group their share not only of the marginal cost of their representation but their share of the cost of assembling and maintaining the group resources available to their bargaining units on call, *if* the costs of calculating the agency fee on this basis were not prohibitive, and *if* employees could not opportunistically change status depending on whether the fee charged objectors was greater or less than normal dues, *then* it would be a matter of indifference to the other employees whether the objecting employees financed their share of collective-bargaining-related costs on a "direct-costing" or a multiunit "cost-sharing" basis.

Because not one of these three conditions prevails in the real world, the actual result of "direct costing" is, however, to permit objectors to free ride.

1. As we have seen (pp. 8-13, *supra*), the multiunit cost-sharing method of providing services generates substantial economic benefits in addition to the provision of a discrete service at a discrete time. Where this method obtains, the services that are provided are likely to be more diverse, more effective, and less expensive than those a single unit could purchase for itself on the open market. These benefits also include assurance of future access to greater resources than would otherwise be available, a factor of significant *current* economic value whether or not the unit actually uses the resources in a given year, or ever.

Thus, an individual who simply pays the direct costs of such collective-bargaining-related services as are rendered in a given year to a given unit, and does *not* otherwise contribute toward maintaining the union structure that provides services of enhanced quality and at a lower-than-market cost necessarily reaps the special economic benefits provided *without paying for those benefits.*[15] That being so, Michigan has determined, in its

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[15] A return to the HMO analogy may help to clarify this point: An HMO might choose to provide health services to members of the general public who are not regular subscribers. If so, however, the HMO would *not* simply charge nonsubscribers the directly traceable dollar costs of providing those services, likely to be "as much as one-fourth to one-third lower than traditional care in some parts of this country." S. Rep. No. 93-129 on the Health Maintenance Act of 1973, *supra*, 2.

Rather, the HMO would seek to set its price to reflect the quite different economic value of the discrete services provided if purchased on the open market on a fee-for-service basis. To do otherwise would be unfair to the regular subscribers, who would then be shouldering for an individual who chose not to participate in this group economic endeavor the costs of maintaining a system capable of producing low-cost high-quality services when needed.

Further, where that cost in a particular instance exceeded the flat fee paid annually by subscribers, the subscribers would not be expected to absorb that extra cost, but instead would pass it on to the nonsubscriber. And nonsubscribers would not have the

public employee collective bargaining statute, that objecting fee payers *cannot* in this fashion refuse to provide their full pro rata economic support to the system for providing collective-bargaining-related services actually chosen by the bargaining unit as a whole. *Bridgeport-Spaulding Community Schools*, 1986 Mich. Emp. Rel. Comm'n 1024; *Garden City School District*, 1978 Mich. Emp. Rel. Comm'n 1145; *Swartz Creek Community Schools*, 1971 Mich. Emp. Rel. Comm'n 645, 653.

2. The central premise of this Court's agency fee cases is that states may, *consistent with the Constitution*, "prevent 'free riders'—those who receive the benefit of union negotiation with their employers, but who do not choose to join the union and pay dues—from avoiding their fair share of the process from which they benefit." *Keller v. State Bar of California*, —— U.S. ——, 110 S. Ct. 2228, 2235 (1990). As Michigan has recognized, employees who reap the economic benefits of union representation on a multiunit/cost-sharing basis without sharing all the relevant costs *are* "avoiding their fair share of the process from which they benefit."

Moreover, because the Michigan statute limits the periodic fees of objecting nonmembers to the amount paid in dues and assessments by union members, objecting fee payers *cannot* be charged the full cost of such services as are actually supplied to their bargaining unit, where that cost in a given year is higher than the unit income realized from the pro rata fee. That being so, a unit-by-unit allocation of union expenditures would further frustrate the governmental interest in preventing free riding. For objecting fee payers could avoid paying even the union's immediate direct costs of providing collective-bargaining-related services to their unit in the

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assurance available to subscribers against very high health costs in a single year.

In short, a nonsubscriber could *not* claim the special economic values created by the prepaid funding system without contributing on a continuing basis to the support of the system.

years those costs *exceed* the unit income based on the dues charged to union members.

To be sure, in theory at least, Michigan *could* avoid this problem by permitting agency fees to fluctuate according to direct bargaining unit costs with no regard to the dues charged union members. But the judgment made in the Michigan statute (as well as in the NLRA, RLA, and all state labor relations statutes of which we are aware) is that placing a ceiling upon the fees paid by nonmembers at the level members charge themselves is the best assurance that collective bargaining costs are fairly allocated between members and nonmembers. To permit nonmembers to be charged *more* than members would lead to questions of equitable distribution potentially much more serious than those raised under the present scheme.

The judgment of every legislature that has looked at the question is entitled to respect in this regard, absent some clear Constitutional reason for favoring a system mandating entirely different schemes for members and nonmembers to pay for collective bargaining-related expenditures.[16]

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[16] Further, by insisting upon the right to have the union trace costs and calculate fees based upon an entirely different economic model than the one a majority of employees in the unit have chosen as the best one for their workplace, objecting fee payers would require of the union an administrative task that would be extremely costly to the extent it could be performed at all.

For example, to determine its expenditures in one bargaining unit, CWA would have to determine its own direct expenditures in each of the more than 700 units that union represents, and would have to allocate between units those expenditures benefitting less than all represented employees but more than one unit, such as joint bargaining, industry-specific economic research, and so on. In addition, CWA would have to calculate the expenditures for each unit made by each local representing unit employees; this task would by exceedingly complex, since many of the locals, like CWA itself, provide services to members of more than one unit, and for large units, many different locals provide representation. For a ration-

3. Thus, petitioners' argument comes down to the claim that the Constitution erects a mandatory preference for unit-by-unit funding of collective-bargaining-related services, so that objecting fee payers can *either* avoid paying their full share of the collective bargaining benefits made available to them *or* force the unit as a whole to forego its choice of a national union or its affiliate as the unit's representative in favor of a single unit bargaining representative. But just as "a Constitution is not intended to embody a particular economic theory" (*Lochner v. New York*, 198 U.S. 45, 75 (1904) (Holmes, J., dissenting)), so it is clear under this Court's cases that the First Amendment erects no preference for one "reasonable" and "normal" economic model for providing and funding collective-bargaining-related services, and for preserving labor peace by preventing "free-riding," over another.

(a) Petitioners' overall constitutional theory here is that First Amendment doctrine requires that *each and every* type of expenditure that a union seeks to charge to objecting fee payers be judicially scrutinized to determine whether that expenditure is *essential* to the representation of employees, rather than simply appropriate and useful toward that end. Pet. Br. 10-12. In other words, petitioners' argument is that a conscientious union that goes beyond the statutory minimum in fulfilling its representational responsibilties must allow objecting nonmembers to be "free riders," and to reap the benefits, without sharing in the burden, of such expenditures.

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wide unit in AT&T, this could require analyzing in detail the expenditures of hundreds of local unions.

Tasks of this kind could well prove so costly that complex multiunit unions would have to choose between foregoing collection of agency fees from dissenting fee payers entirely and using up much of the per capita savings achieved through a multiunit organization on the administrative costs of calculating those fees. In either case, the problem of "free-riding" would be greatly exacerbated.

This Court's recent First Amendment cases show as a general matter that legislation that serves a sufficiently strong overall governmental interest is not to be invalidated through strict judicial scrutiny of each *specific* application of the statute. *Board of Trustees v. Fox*, —— U.S. ——, 109 S.Ct. 3028, 3033 (1989) (least restrictive means standard does not apply, despite some interference with First Amendment interests, in testing the validity of time, place and manner restrictions, regulation of expressive conduct, or restrictions upon commercial speech.) *See also, e.g., Clark v. Community for Creative Non-Violence* 468 U.S. 288, 293, 299 (1984) (although "sleeping in connection with [a] demonstration is expressive conduct protected to some extent by the First Amendment," the Court nonetheless upheld a ban upon sleeping overnight in certain parks, because the Court "[did] not believe that [the First Amendment] assign[s] to the judiciary the authority to replace the Park Service as the manager of the nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained."); *Buckley v. Valeo*, 424 U.S. 1, 29, 30 (1976) (applying a "rigorous standard of review" the Court upheld a particular contribution limitation because "'[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe whether, say, a $2,000 ceiling might not serve as well as $1,000'. . . . Such distinctions in degree become significant *only when they can be said to amount to differences in kind*'" (emphasis added)).

(b) As is only to be expected then, it is perfectly clear that the Constitution does *not* as a general matter straitjacket Congress or the state legislatures into requiring unions to adhere to one method of providing collective-bargaining-related services to employees as a condition for requiring objecting fee payers to provide pro rata financial support for those services:

> The very nature of the free rider problem and the governmental interest in overcoming it require that the union have a certain flexibility in its use of com-

> pelled funds. "The furtherance of the common cause leaves some leeway for the leadership of the group." *Abood v. Detroit Board of Education, supra,* 431 U.S. at 221-222. . . . [*Ellis v. Railway Clerks, supra,* 466 U.S. at 456-57.][17]

Where the group has determined that collective-bargaining-related services are most effectively provided on a multiunit/cost-sharing basis rather than a unit-by-unit, fee-for-direct-services-rendered basis, that determination is one to "promote the cause which justified bringing the group together," and "the individual cannot withdraw his financial support merely because he disagrees with the group's strategy." *Abood v. Detroit Board of Education, supra,* 431 U.S. at 223.

Ellis, moreover, makes it clear that there is *no* constitutional basis for treating multiunit collective-bargaining-related expenses any differently from single-unit expenses:

> By allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights. The dissenting employee is forced to support financially an organization with whose principles and demands he may disagree. . . . It has long been settled that such interference with First Amendment is justified by the governmental interest in industrial peace. . . . *At a minimum, the union may constitutionally "expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining."* . . . The issue is whether [any other] expenses involve additional interference with First Amendment interests of objecting employees, and, if so, whether they are nonetheless adequately supported by a governmental interest. [466 U.S. at 455-456 (emphasis supplied).]

As the italicized language in the above quotation indicates, there is *no* difference of constitutional significance

[17] In recognition of this flexibility, for example, the Court in *Ellis* refused to "fault" BRAC for "choosing to elect its officers at a convention rather than by referendum." 466 U.S. at 449.

between "uniform exactions . . . in support of activities germane to collective bargaining" calculated on multiunit/cost-sharing basis, and such exactions calculated on a unit-by-unit, fee-for-direct-services-rendered basis. In either case, the objecting fee payer's First Amendment interest in limiting payments stems from financing the bargaining activity in which the union is engaged. *See also Roberts v. United States Jaycees*, 468 U.S. 609, 637-38 (1984) (O'Connor, J., concurring).

Precisely because the multiunit/cost-sharing method for providing and funding collective-bargaining-related activities *does not vary the kinds of activities supported one whit*, "the fact that the employee is forced to contribute does not increase the infringement of . . . First Amendment rights already resulting from the compelled contribution to the union." *Ellis v. Railway Clerks, supra,* 446 U.S. at 456. An individual's First Amendment interest in refusing to "support financially an organization with whose principles and demands he may disagree" (*id.* at 455), does *not*, in other words, change *qualitatively* because of the way in which that organization chooses to calculate and allocate that financial support, as long as the *nature* of the activities supported remains the same.

3. Despite the foregoing, petitioners maintain that *Ellis compels* the conclusion that collective-bargaining-related activities can only be charged to nonmembers on a single unit, fee-for-direct-service-rendered basis. That contention is untenable, both on the basis of *Ellis'* basic rationale, just discussed, and for two additional reasons.

(a) First, the *Ellis* Court necessarily *rejected* the position petitioners suggest *Ellis* adopted. The central contention of the *Ellis* plaintiffs throughout that litigation was that as nonmembers, they constitutionally could "be compelled to contribute [to the exclusive representative] *no more than* their pro rata share of the expenses of negotiating agreements and settling grievances *with Western Airlines*." 466 U.S. at 439 (emphasis supplied).

The *Ellis* district court, although upholding the contention that chargeable expenses are limited to those incurred in collective-bargaining-related activities, did *not* exempt the *Ellis* plaintiffs from contributing to the actual negotiation and contract administration expenses of units other than the ones at Western Airlines. *See Ellis v. Brotherhood of Railway, Airline & S.S. Clerks*, 685 F.2d 1065, 1075 (1982) (Whelan, J. dissenting) (quoting verbatim the district court's list of nonchargeable expenses). In this Court, the *Ellis* plaintiffs reiterated, both generally and with respect to the particular expenses the district court had held chargeable, their contention that objecting fees payers could be charged only the direct costs of bargaining in the unit in which the fee payers are employed.[18]

This Court, however, *rejected* the general principle that national unions must charge objecting fee payers on a fictional single-unit basis. Chargeable costs, the Court held, include "*not* only the direct costs of negotiating and administering a collective bargaining contract and of settling grievances and disputes, but *also* the expenses of activities or undertakings *normally or reasonably* employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit." 466 U.S. at 448 (emphasis supplied); *see also id.* (emphasis supplied) (test is whether challenged expenditures are "necessarily *or* reasonably incurred.")

On this basis, the *Ellis* Court went on to approve as chargeable expenses social activities and conventions of the *national* union without regard to the connection of

[18] *See Ellis* Petitioners' Br. at 22 (only those convention expenditures "directly related in fact to representation of the Western Airlines bargaining unit [are] chargeable to plaintiffs"); *id.* at 24 (social expenses should not be chargeable unless "attended by the employer"); *id.* at 27 (contending that because "BRAC did not prove its costs of collective bargaining with Western Airlines" and "has [not] maintained accounting records to isolate the costs of collective bargaining with Western Airlines", the union did not meet its burden of proof).

such expenses to a particular bargaining unit, as well as publications that communicate "collective bargaining, contract administration, and employees' rights to *employees represented by BRAC*," and not only those at Western Airlines. 446 U.S. at 450 (emphasis added). Moreover, the Court necessarily rejected as well the *Ellis* plaintiffs' insistence that the union had not met its burden of proof with regard to those expenses that specifically concern negotiations and grievance adjustment, albeit not directly to Western Airlines bargaining. *Cf.* 466 U.S. at 457 n.15.[19]

(b) Second, reading *Ellis* as petitioners do would put *Ellis* at odds with this Court's pre-*Ellis* discussions of the proper remedial accommodation between the interests of the majority and those of objectors.

From the outset, this Court's opinions have stressed that in allocating bargaining-related costs to dissenting feepayers, any economically sensible approach is allowable. Thus, *Railway Employes' Dept. v. Hanson, supra*, 351 U.S. at 238, stated that, so long as "[t]he financial support required relates . . . to the work of the union

[19] The *Ellis* Court did hold two categories of expenses—for "general litigation and organizing efforts"—not chargeable to objecting fee payers. 466 U.S. at 41. While the *Ellis* Court did not explain in constitutional terms why some litigation and all organizing expenses were treated differently than other expenses for purposes of the *Ellis* plaintiffs' unit-by-unit argument, we surmize that the reason is this:

Both litigation "not involving the negotiation of agreements or settlements of grievances" (466 U.S. at 440)—which we take to be short hand for litigation that is not collective-bargaining-related—and organizing implicate heightened First Amendment interests, separate from those involved in requiring support of union activity germane to collective bargaining generally. *See In re Primus*, 436 U.S. 412 (1978); *Ellis v. Railway Clerks, supra*, 466 U.S. at 452 & n.13 (organizing involves proselytizing on behalf of the union, not engaging in representation of employees for bargaining purposes); *id.* at 456 (where "the communicative content is . . . inherent in the act," union expenditures with some relationship to collective bargaining may be held to a stricter First Amendment standard than where the objection is simply that it is a *union* expense).

in the realm of collective bargaining[,] [n]o more precise allocation of union overhead to individual members [than charging uniform dues] seems to us to be necessary." *Machinists v. Street*, 367 U.S. 740 (1961), after holding that a union could not expend fees received from an objecting employee on politics, suggested as a remedy for such expenditures a refund of a portion of the objector's payments "in the same proportion that the expenditures for political purposes . . . bore to the total union budget" (*id.* at 775), and specifically stated there was no requirement "to trace [the objector's] money up to and including its expenditure," (*id.*). *Railway Clerks v. Allen*, 373 U.S. 113 (1963), reiterated the remedy suggested in *Street*, noting that to carry out this remedy "two determinations will have to be made: (1) what expenditures disclosed by the record are political; (2) what percentage of *total* union expenditures are political expenditures. . . ." *Id.* at 121 (emphasis supplied). The *Allen* Court emphasized that "[a]bsolute precision in the calculation of such proportion is not, of course, to be expected or required. . . ." *Id. See also Abood v. Detroit Board of Education, supra*, 431 U.S. at 237-242 (following the foregoing precedents).

Petitioners' unit-by-unit accounting requirement cannot be squared with any of these statements by the Court concerning the appropriate remedy in agency fee cases. By petitioners' lights, even a union that spent *all* of its funds on collective bargaining would have to make a "precise allocation of union overhead to individual members" (*Railway Employes' Dept. v. Hanson, supra*, 351 U.S. at 238) on a unit-by-unit basis. And, under petitioner's theory, the proper remedy for the use of an objector's payments for nonchargeable expenditures could not be the one spelled out in *Street* and *Allen*, since the "practical decree" suggested there does *not* require a further, unit-by-unit breakdown of the union's total expenditures.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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